THE

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AND

ENGLISH

RAILROAD CASES

A COLLECTION OF ALL THE

RAILROAD CASES IN THE COURTS OF LAST RESORT IN AMERICA AND ENGLAND.

EDITED BY ADELBERT HAMILTON.

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Glasgow and Southwestern R. Co.

v.

Mackinnon *et al.*

(*Law Reports*, 11 *House of Lords*, 386.)

A railway company agreed with A. & B., coalowners, that they would carry their coal, subject to clause 11, at certain charges given in the schedule, and they also agreed (clause 9) that in the event of their charging any other trader for the same description of traffic lower rates than those stipulated to any station, then in that event A. & B. were to have a corresponding reduction in the rates payable by them to such station. Clause 11 was to the effect that notwithstanding the rates or charges before specified, they were entitled to charge A. & B. rates or charges similar to those charged and paid by the Eglinton Coal Co.; and in the event of any consideration being given to the Eglinton Co. for raising them, a similar consideration shall be given to A. & B. The railway company charged D., another coalowner, not a party to the agreement, a lower rate per ton, taking into account the greater distance the coal was carried. The agreement with the Eglinton Co. was not in evidence. It was alleged the rate charged A. & B. was not higher than that charged to the Eglinton Co.:

Held, affirming the decision of the Court below, that there was nothing in clause 11 to supersede the effect of clause 9, and that upon the true construction of the latter clause A. & B. were entitled to a corresponding reduction with D., and repayment of over-charges; "lower rates" meaning proportionately lower rates per ton per mile, and not a less sum per ton irrespective of the distance carried.

Appeal against an interlocutor of the Second Division of the Court of Session, Scotland.

The appellants, the Glasgow & Southwestern R. Co., as the first party, made an agreement in 1875 with a large number of coalowners in Ayr, as the second party, including one of the respondents. The material clauses of this agreement were as follows:

"Second. The second party respectively shall, subject to article 11 hereof, as from the said date pay to the first party, for and in respect of the traffic of the second party before mentioned, the charges following, viz.: For and in respect of common and fireclay bricks and tiles passing along the said railways the second party shall pay to the first party the charges specified in Schedule A, hereto annexed, and signed as relative hereto; and for and in

respect of coal and dross passing along the said railways the second party shall pay to the first party the charges specified in Schedule B, hereto annexed.

"Ninth. It is hereby provided and agreed that in the event of the first party charging to any other trader, for a distance above six miles, for the said description of traffic to any station or place, lower rates than those stipulated in this agreement to be paid by the second party, then, and in that event, the first party shall give to the second party a corresponding reduction in the rates payable by them for their traffic of a similar description to such station or place, while and so long as such lower rates are charged against such other trader.

"Ten. The present agreement shall subsist and endure until February 1, 1890.

"Eleven. It is specially agreed that, notwithstanding the rates or charges before specified, the first party shall be entitled to charge and the second party shall be bound to pay rates or charges similar to those which may for the time being be charged to and paid by the Eglinton Iron Co. in respect of the carriage of common and fire-clay bricks and tiles and coal and dross for land sale and shipment, not exceeding the scale of rates and charges paid by the second party immediately preceding the 1st day of January, 1874, and in the event of any consideration being given to the Eglinton Co. a similar consideration shall be given to the second party to this agreement."

Schedule B, which referred to cost and distances, was as follows:

"When carried six miles or under, the sum of 7½d. per ton; when carried any distance above six miles and not exceeding sixteen miles, the sum of 1¼d. per ton per mile; when carried any distance above sixteen miles and not exceeding twenty-six miles, the preceding rate for the first sixteen miles, and for every mile thereafter the sum of ⅝d. per ton per mile. When carried any distance exceeding twenty-six miles, the preceding rate for the first twenty-six miles and for every mile thereafter the sum of ½d. per ton per mile."

William Mackinnon, one of the respondents, as trustee on the sequestration of Allan Gilmour, one of the above-mentioned coal-owners, raised this action, concluding, *inter alia*, for a finding that the appellants had been from a specific date charging to other traders, for a distance above six miles, for the carriage of coals to Troon Harbour, lower rates to the extent of 6d. per ton than those stipulated in the agreement; and further, to find and declare that the defenders were bound to give to the respondents from the same date a reduction of 6d. per ton in the rate payable by him for the conveyance of coals from Portland Colliery to Troon Harbour, so long as such lower rates are charged against the other traders. He also concluded for payment of £198 8s. 2d. as overcharge. They

stated, and it was not denied, that while they were charged 1s. 3d. per ton for carriage of their coal from Portland Colliery to Troon, a distance of twelve miles, being the proper charge at the rate stipulated in Schedule B of the agreement, viz., 1¼d. per mile, the appellants were carrying coals for the proprietors of the Lanemark Colliery, who were not parties to the agreement, from their colliery to Troon and Ayr, distances of thirty-one miles and twenty-four miles, respectively, for 1s. 7d. and 1s. 9d. per ton. The proper sum exigible for the Lanemark coal, if it had been charged at the same rate per ton per mile as the Portland coal, would have been 2s. 6d. per ton to Troon and 2s. 2d. to Ayr. The appellants denied that in any case had they charged for the same description of traffic to any station lower rates than these stipulated in the agreement to be paid by the second party. They also founded on the terms of clause 11 of the agreement; and under reference thereto stated that the rates charged by the appellants for the carriage of the respondents' coal do not exceed the rates charged and paid by the Eglinton Iron Co. for the carriage of their coal to the same place for the same distance, and do not exceed the scale of rates and charges paid by the second party immediately preceding the 1st of July, 1874.

On the 11th of March, 1885, the Sheriff Substitute found that the respondents were entitled to a reduction; and in a second interlocutor, dated the 15th of April, 1885, he found that the pursuer was entitled to select any individual trader, not being a party to the said agreement, to whom lower rates than those therein specified are charged and to insist on being placed on an equal footing with him; and he also found that the amount due to the respondents was £148 16s. 1½d.

The appellants lodged a reclaiming note. On the 15th July, 1885, the Second Division of the Court of Session adhered, 12 Court Sess. Cas. 4th Series, 1309; 22 Scot. Law Rep. 875. The Lord Justice Clerk said: "The defenders contended that the real object of clause 9 was to equalize the cost to the traders, so that he who paid for six miles, or ten miles, or twelve miles, should pay as much, but no more, than he who had his coal carried for twenty or thirty miles. That would not be expressed by the term 'rates.' Rates imply payment on a principle, and the principle here adopted is so much per ton per mile. This is the standard, and according to that standard obedience to or infringement of this agreement is to be judged."

The Lord Advocate (*Balfour*, Q. C.), and *R. S. Wright* (with them Sir *R. Webster*, Q. C.), for appellants.

Moulton, Q. C., and *A. D. Maclaren*, were heard on the second point only. *The Lord Advocate*, in reply.

Lord Blackburn.—The question turns upon the construction of an agreement which is set out, and of which I think only the 2nd,

9th, and 11th articles are in any way important. [His Lordship read the second article.] It refers to the charges which are in the schedule, which I need not at present read. I need only state that there are such charges, and that those charges are made to depend upon the distance for which the coals have been carried along the railway. [His Lordship then read the 9th article.]

CONSTRUCTION OF AGREEMENT —CHARGES IN SCHEDULE.

It is admitted that the railway company do charge to Troon (taking one place for instance) from Lanemark a rate which is considerably lower than the rate in the schedule, and that they do continue to charge against the pursuers the scheduled rate, which is higher consequently than that which they actually do charge to the Lanemark Colliery Company. An attempt has been made, unsuccessfully, both before the Sheriff Substitute, and before the Court below (and I think rightly unsuccessfully), to argue that the 9th article has the effect of saying that so long as they do not charge to any one else a lower sum to Troon than the sum which they charge to the pursuers to Troon, it does not matter how much further they may carry gratis, throwing the extra distance into the bargain. I do not think that that can be the true construction of the agreement. It does not seem to be the meaning of the words, and certainly, according to my view of it, it is not what the parties would be likely to intend. That being the unanimous opinion of the Sheriff Substitute, and of all the judges in the Court of Session, I do not think it necessary to dwell further upon that point.

But there then comes a matter which it is somewhat difficult to understand. After that 9th article there comes the 10th: "The present agreement shall subsist and endure until the 1st day of February in the year 1890." Then comes the 11th article, which quite evidently relates to a new subject which begins there. The 2nd article had provided that "the second party respectively shall, subject to art. 11 hereof, as from the said date, pay to the first party" the rates in the schedule. Then this 11th article comes in and says: [His Lordship read it.] The contention has been that the effect of that article is to say that so long as the Eglinton Company are charged as much as or more than the pursuers, the pursuers have no right to complain and no right to redress, though the 9th clause is broken—that they cannot recover on that ground. It is difficult to understand this 11th stipulation without having seen the whole of the agreement with the Eglinton Company, and knowing the facts about it, so as to see what that agreement actually was. The only thing that it is material to consider at present is, does the mere fact (which is all that is averred, and I think it is not at all disputed) that the Eglinton Company do actually pay a higher sum, deprive the pursuers of the right to recover the £148 which, according to the

RIGHT OF PURSUERS TO RECOVER AMOUNT EXTORTED.

construction I have already put upon the previous article of the agreement, has been wrongfully extorted (if I may use the phrase) from them in consequence of the railway company having carried more cheaply the coals from the Lanemark colliery? I cannot see it. It is very difficult indeed to construe this agreement without having the whole of the Eglinton agreement before us, and seeing what the Eglinton Company were doing; but this much I may say—it is what the Lord Justice Clerk says—indeed it is the whole of what he says upon this point: "They say if the Eglinton Company are charged no more than the charge now made against the complainers, they are not within the 9th clause at all. But I am not prepared to give effect to that contention, and on the whole matter I think the company is here in the wrong." I thoroughly agree in that—I have felt rather a desire myself to say a little more than merely to say that "I am not prepared to give effect to that contention," but upon looking at it I find that it all comes round to that. The burden is very strong indeed upon the company to show that art. 11 does bear such a construction as to nullify art. 9 which goes before it. They have not given any grounds for that, and consequently I do not think I can go much further than to repeat again what the Lord Justice Clerk has said, namely, that I am not prepared to give effect to that contention.

That being so, I think that the interlocutor appealed against is right, and that the appeal now lodged ought to be dismissed with costs, and I move accordingly.

Lord FitzGerald.—I entirely concur. I only desire to say, as to art. 11, that I have found great difficulty in understanding the argument as to its effect and operation, and I am not at all sure that I have a very clear conception of it at present; but I certainly do decline to offer an opinion upon an agreement which is not before us, and which if it was to be relied upon in the manner in which it has been relied upon to-day by the Lord Advocate, ought to have been put forward prominently by the defenders and ought to have been before your Lordships now.

There is one point I may advert to. As I understand the case as it stands it is this. The condition of things at the time this agreement of 1875 was entered into was that the coalmasters were then paying rates under the agreement of 1874. The Eglinton Company were then paying rates in a lesser degree under their own special agreement, which is not before us. The object and intention of the parties seem to have been to equalize these two things. The result was, as I understand by the answer to an inquiry which I made in the course of the argument, that the schedule of rates under this agreement of 1875, and the rates payable by the Eglinton Company represented the same thing—they

STATEMENT OF CASE.

were equal in degree, and there has been no change of circumstances since. The Eglinton rates have not been altered. There is indeed a statement that they had been diminished in reference to one particular colliery, but that being objected to they were immediately increased again, and potentially the state of facts is the same now as it was when this agreement was entered into in 1875.

AGREEMENT CONSTRUED.

Every agreement is construed, not according to circumstances which may arise, but according to the circumstances existing at the time the agreement was entered into. We have not the Eglinton agreement before us, and I am at a loss to see what effect it can have upon art. 9 of this agreement. Article 9 speaks of the "rates stipulated in this agreement"—these are the rates, and if there had been any change of rates under article 11 that change of rates would still represent rates stipulated for in this agreement, and would leave, as to these rates, article 9 in full force. The truth is that there has been no change. I do not know that the case comes before us in the light in which we ought to express any opinion upon it so far as regards the Eglinton agreement. Upon the statement which is before us, therefore, I quite agree with my noble and learned friend that as to this art. 11 the less we say the better; but I cannot refrain from making this observation, that the whole language of art. 11 points to an increase of rates and not to a diminution; it points to an authority to charge on the one side and a liability to pay on the other. You will find that the only additional stipulation is that in the event of the railway company having bribed the Eglinton Company to submit to an increase of rates, it shall give exactly the same bribe to the coalmasters as it has given to the Eglinton Company.

MEANING OF "LOWER RATES."

LORD HALSBURY.—I cannot help thinking that the question which is raised upon art. 9 of this agreement is absolutely free from doubt. I think that when the words "lower than those stipulated in this agreement" and "a corresponding reduction in the rates," spoken of in the latter part of the clause, are looked at, it is *luce clarius* that what the parties were contemplating was the proportionate relation of the charges to be made to the work to be done by the company. Therefore I am of opinion that the first contention of the appellants here must fail.

With reference to the 11th clause I confess myself unable quite to follow the reasoning of the Sheriff Substitute and to some extent of one of the learned judges in the Court below; but I do not propose to give any exposition of my own of this 11th clause, because I believe that the materials are not before us which would sufficiently enable us to form a precise notion of what the clause contemplates. It is enough in this case to say that I think it

would be an unreasonable construction of the agreement as it stands to suppose that clause 11 is intended to override and control the effect of clause 9. I can conceive of a number of circumstances, and among them I can conceive of an agreement with the Eglinton Company, such as would render the provision of clause 11 not an unreasonable and not an unintelligible one, saving nevertheless all the rights which are conferred by clause 9 upon the parties to this agreement.

Under these circumstances I quite concur in the judgment which has been moved.

Interlocutor appealed against affirmed; and appeal dismissed, with costs.

Discrimination in Freight Rates.—See note to Schofield *v.* Lake Shore, etc., R. Co., 23 Am. & Eng. R. R. Cas. 644.

Coal Traffic—Terminal Charges—Extraordinary Services—Construction of Special Act.—M. R. Co. were authorized by this act to charge for coal carried in owners' wagons at a rate not exceeding 1d. per ton per mile for conveyance, and for everything incidental to conveyance; also reasonable sums for certain terminal and extraordinary services, viz. : "Loading, covering and unloading of goods, delivery and collection, and other services incidental to the business or duty of a carrier, where such services or any of them are or is performed by the company, and warehousing and wharfage of goods, or any other extraordinary services performed by the company."

Held, upon the authority of "The Lancashire and Yorkshire R. Co. *v.* Gidlow," that haulage and shunting in marshalling the traffic from collieries with services incidental to conveyance, and that back haulage of empty wagons was not a service for which a charge could be made under the clause above set out, but that providing, maintaining and working signalling and interlocking apparatus at a junction with the colliery siding was an extraordinary service within that clause, because it was a service from which the general public using the railway derived no benefit, but was performed for the benefit of the colliery proprietors alone, and that 3d. per ton was a reasonable charge in respect of such service.

Held, also, that providing coal shoots for unloading coal in wagons was a service within the above-mentioned clause, for which 2d. per ton was a reasonable charge. Dunkirk Colliery Co. *v.* Manchester, Sheffield & Lincolnshire R. Co., 2 Nev. & Mac., p. 402.

Coal Traffic—Same Description of Goods.—A railway company carried coal to G. for shipment from collieries situate on different branches of their line. On one branch the company charged different rates per ton per mile for the carriage of different descriptions of coal—gas-coal rate and a common-coal rate. No such classification was made in the other branch.

Cannel coal (the only coal made by the complainants) was the only coal charged at the gas-coal rate, splint coal being classed as common coal.

The gas produced from splint coal is inferior in quality and quantity to that produced from an equal amount of cannel coal, but both are used in different proportions for mixing with common coal in the manufacture of gas, for the purpose of increasing its illuminating power.

Found, as a matter of fact, that splint coal and cannel coal had enough in common of gas-producing quality to be competive, and to make them commercially and substantially of the same description for the purpose for which they were used, and that the cost of conveyance to the railway company of splint and cannel coal was the same; and therefore

***Held*, that the carriage of cannel coal and splint coal by the railway company at unequal rates per ton per mile was an undue prejudice to the complainants.**

***Held*, also, that if by reason of the gradients or otherwise the cost of conveyance of the coal to the railway company on the one branch was different from the cost on the other, a proportionate difference might be made by the railway company in the mileage rate. Nitshill & Lesmahago Coal Co. *v.* Caledonian R. Co., 2 Nev. & Mac., 39.**

INDIANAPOLIS, DECATUR AND SPRINGFIELD R. CO.

v.

ERVIN *et al.*

(*Advance Cases. Illinois.* *October* 16, 1886.)

An agreement between a shipper of goods by railroad and the general freight agent of a railroad company, that the former should pay the regular rates of freight charged to and paid by the public generally for similar services and like distances, and that the company should pay back to the shipper, by way of rebate, a portion of the freight so charged and paid, thereby giving to him a less rate for transportation than is given to the public generally, is void, as in violation of the statute approved May 2, 1873 (Rev. Stat. 1874, p. 816), against unjust discrimination between shippers, and such rebates of freight cannot be recovered by the shipper from the company.

Unjust discrimination by common carriers is not sanctioned by the common law.

When a contract is forbidden by the common or statute law, no court either of law or equity will lend its assistance to give it effect.

ERROR to the Appellate Court, Third District, to review a judgment affirming a judgment of the Douglass Circuit Court in favor of plaintiff in an action to recover for certain rebates of freight on contracts for shipment of grain over defendant's railroad. Reversed.

The facts are stated in the opinion.

James A. Eads for plaintiff in error.

C. C. Clark and *Nelson & Harnsberger* for defendants in error.

SHELDON, J.—This action was brought by Rice Ervin and John Ervin against the Indianapolis, Decatur, & Springfield Railway Company, to recover for certain rebates claimed to be due them on certain contracts for the shipment of grain over the defendant's railroad from Tuscola, Ill., during the years 1879, 1880 and 1881. The general issue and a special plea setting out these contracts were filed by the railway company. A demurrer

FACTS.

was sustained to the special plea. On the trial of the case in the court below, the defendant offered to prove under the general issue that at and before the time of making the contracts sued on, defendant had established a schedule of reasonable rates and tolls for the transportation of grain and other property over its railroad in accordance with the schedule of rates that had been prepared for it by the Railroad and Warehouse Commissioners of the State of Illinois; that plaintiffs resided at Tuscola, Ill., and were engaged in buying grain and shipping it over defendant's railroad; that plaintiffs and the general freight agent of the defendant entered into a secret agreement that the grain and other property of plaintiffs to be shipped over the railroad should be billed out and charged at the regular schedule rates, and that the same should be paid by plaintiffs, the same as was charged to and paid by the public generally for similar services under similar circumstances and for like distances, and that the company should pay back to plaintiffs, by way of rebate, a portion of the freight so charged and paid, from two to eight cents per hundred pounds on all grain shipped by them over the road, giving to plaintiffs a less rate for transportation than was given to the public generally for like services under similar circumstances and for like distances. That the rates so given to plaintiffs were private, and not open to the public generally, and less than were charged to the public generally, less than the schedule rates and than any other shipper had except Davis & Finney. That plaintiffs and Davis & Finney did the bulk of the grain business on the railroad. That no other grain shippers had such special rates, and could not compete with plaintiffs. This evidence was all excluded by the court and exception taken. The special plea sets out substantially the same facts, with the addition that the president of the company had instructed the freight agent not to allow plaintiffs less than the regular rates, of which plaintiffs had notice, and that they had notice of the regular schedule rates. Judgment went for the plaintiffs for $6,711.73 after the overruling of a motion for a new trial, and was affirmed by the Appellate Court for the Third District. Defendant sued out this writ of error.

It is insisted the contracts as set out in the special plea and offered to be proved at the trial are void, as in violation of the statute of the State against extortion and any unjust discrimination by railroad companies in freight and passenger rates, and as against public policy. This question, as respects the statutes above named then in force, was presented before this court in Toledo, W. & W. R. Co. *v.* Elliott, 76 Ill. 67, where a contract for such a rebate was held not to be in violation of the statute to prevent unjust discrimination in charges by railroad carriers. This ruling was followed and affirmed in Erie & Pac. Des. *v.* Cecil, 112 Ill. 185.

VALIDITY OF CONTRACT—DISCRIMINATION—APPLICATION OF STATUTES.

It is contended by appellees' counsel that those cases should control the present decision. The statute under which the Elliott decision was made was different from the present statute, which applies here. The contract in the Elliott Case was made in February, 1872, and the statute which applied there was the Act which went in force July 1, 1871, entitled "An Act to Prevent Unjust Discrimination and Extortions in the Rates to be Charged by the Different Railroads in This State for the Transportation of Freight on Said Roads." Laws, 1871–72, p. 635. That Act provided only against unjust discrimination between places, and not between individual shippers, so that it was well said in the Elliott Case: "We do not understand the contract is at all in violation of the statute to prevent unjust discrimination in charges by railroad carriers."

But a subsequent statute approved May 2, 1873, which went in force July 1, 1873 (Rev. Stat. 1874, p. 816), and is the one applying to this case, provides against unjust discrimination between individual shippers as well as between places. The second section of the Act provides in general terms: If any railroad corporation in this State shall make any unjust discrimination in its rates or charges of toll for the transportation of passengers or freight upon its road, it shall be deemed guilty of having violated the provisions of the Act and be subject to its penalties. Section 3, after speaking as to discrimination between places, provides further: "Or if it (railroad corporation) shall charge, collect, or receive from any person or persons, for the transportation of any freight upon its railroad, a higher or greater rate of toll or compensation than it shall at the same time charge, collect or receive from any other person or persons for the transportation of the like quantity of freight of the same class, being transported from the same point in the same direction over equal distances of the same railroad, or if it shall charge, collect, or receive from any person or persons a higher or greater amount of toll or compensation than it shall at the same time charge, collect, or receive from any other person or persons for receiving, handling, or delivering freight of the same class and like quantity at the same point upon its railroad," or shall make the like discrimination between persons for the use and transportation of any railroad car, "all such discriminating rates, charges, collections, or receipts, whether made directly or by means of any rebate, drawback, or other shift or evasion, shall be deemed and taken against such railroad corporation as *prima facie* evidence of the unjust discriminations prohibited by the provisions of this Act," and "this section shall not be construed so as to exclude other evidence tending to show any unjust discrimination in freight and passenger rates." The fourth section provides that any such railroad corporation guilty of making any unjust discrimination as to passenger or freight rates, or the

rates for the use and transportation of railroad cars, or in receiving, handling, or delivering freights, shall, upon conviction thereof, be fined in any sum not less than $1,000 or more than $5,000 for the first offence, and increased sums for subsequent offences.

The aim of this statute is against favoritism—against charging one shipper more than another for the like service under like conditions. The statute regards this as unjust discrimination, and punishes and denounces it as such. Unjust discrimination by common carriers was not sanctioned by the common law. In the case of Chicago & A. R. Co. *v.* People, 67 Ill. 16, this court says: "The duties and liabilities of a common carrier are clearly defined by the common law and have been so defined for centuries . . . . Another well-settled rule of the common law in regard to common carriers is that they shall not exercise any unjust or injurious discrimination between individuals in their rates of tolls." In Messenger *v.* Pennsylvania R. Co., 36 N. J. L. 407, it was decided that any agreement by a railroad company to carry goods for certain persons at a cheaper rate than they will carry under the same conditions for others was void, as creating an illegal preference. The plaintiffs in that case had made shipments at the regular rates upon an agreement that they should be allowed such drawbacks as would bring their freights twenty and ten cents per hundred lower than the lowest rate given to any other person. The suit was to recover such drawbacks. The contract was held, upon the principle of the common law, to be illegal, and on that ground a demurrer to the declaration was sustained.

DISCRIMINATION NOT SANCTIONED BY THE COMMON LAW.

Whenever the contract which the party seeks to enforce—be it express or implied—is expressly or by implication forbidden by the common or statute law, no court either of law or equity will lend its assistance to give it effect. 2 Chitty, Contr. 971. This is the well-settled rule of law.

The evidence offered and excluded tended, in our opinion, to make a case of unjust discrimination under the statute of 1873. To prove a contract to give the plaintiffs an undue preference over others in charging them lower rates on their shipments, such a contract appears to us to be one in contravention of this statute. As the matter stands, plaintiffs have paid the regular rates and have been treated alike with other shippers not having had any undue advantage. To enforce such a contract as above, and adjudge defendant to pay the rebates claimed, would be to compel defendant to make an unjust discrimination in favor of plaintiffs and require the company to do what the statute forbids their doing. Such a result the law will not aid in accomplishing.

EVIDENCE HELD TO SHOW DISCRIMINATION.

In the Cecil Case the contract was made in 1881, and was one for a rebate on a single shipment of corn. The principal questions

then controverted and discussed were as to the making of the contract and the authority of the agent. There was no discussion of the validity of the contract. There was merely an extract from the opinion in the Elliott Case, and then this observation: "What was there said is equally applicable here, and under the authority of that case we must hold the agreement in this valid and binding." It was mistakenly remarked that what was said in the Elliott Case was equally applicable in the Cecil Case. The contract in the former case was made when the statute of 1871 was in existence, and the decision there was with reference to that statute. The contract in the Cecil Case was made while the statute of 1873 was in force. But the difference between the two statutes was not brought to the attention of the court, and it was supposed the same statute was involved in both cases. So that the Cecil Case really affirmed nothing more in this regard than that the decision in the Elliott Case with reference to the statute of 1871 was correct.

Neither of these cases, therefore, should control the present one. We are of opinion the Circuit Court erred in sustaining the demurrer to the special plea, and in excluding the offered evidence.

The judgments of the Appellate and Circuit Courts will be reversed, and the cause remanded to the Circuit Court.

Discrimination by Railways.—See McDuffee *v.* Portland, etc., R. Co., 52 N. H. 430; Jackson *v.* Phila., etc., R. Co., 11 Am. L. Reg. (N. S.) 377; Heyl *v.* Same, 51 Pa. St. 469; Pitkin *v.* Long Island R. Co., 2 Darb. Ch. 221; Munn *v.* Illinois, 94 U. S. 113; Thomas *v.* R. Co., 101 U. S. 83; Pacific R. Co. *v.* Seeley, 45 Mo. 215; Audenried *v.* Philadelphia, etc., R. Co., 68 Pa. St. 370.

PARTEE
v
GEORGIA R.

(72 *Georgia* 347.)

The regulations of the railroad commissioners fixing the rates of fare for passengers who obtain tickets from the agents of the companies at their depots, as well as for those who do not, and prescribing the manner in which ticket offices shall be kept open before and at the arrival of trains, do not apply to freight trains, but only to regular passenger trains.

(*a.*) Though a charge may be erroneous, the party in whose favor it is given has no right to a reversal on account of it.

(*b.*) The evidence above shows nothing to establish the unreasonableness of the regulation, nor is it unlawful.

BEFORE Judge Lawson, Morgan Superior Court.

A. M. Partee brought an action for damages against the Georgia Railroad, alleging that he had tendered his fare at the proper rate, but more had been demanded by the conductor, and he had been ejected from the train.

On the trial, the evidence showed, in brief, as follows: Partee desired to come from Rutledge to Atlanta, on the night train. He failed to reach the station in time for the passenger train. The next train which passed Rutledge, going to Atlanta, was a through freight train, which passed about three o'clock A. M. On arriving at the depot about one and one-half o'clock, he found the ticket office closed. He went to the house of the ticket agent, and told him he wanted to buy a ticket to Atlanta; the agent replied that he could not get one. When the train reached the station, plaintiff and another passenger went into the cab, and took seats in a place where passengers usually rode. The conductor asked them where they were going, and they told him to Atlanta. After the train started, the conductor came to collect fare. Plaintiff tendered his fare, at the rate of three cents per mile; the conductor required four cents per mile, and showed a rule-book in which conductors were required to charge four cents per mile to passengers without tickets. Plaintiff still refused to pay that rate, and the train was thereupon stopped, and plaintiff got off. (The evidence for the plaintiff was to the effect that the conductor required him to get off; while the evidence of the conductor was that plaintiff said he would not pay four cents per mile, and if witness would stop the train, he would get off, which was done.) The other passenger had a ticket, and went on. Plaintiff walked back about a mile to the station, and took the next passenger train, which went by about sunrise. The ticket office was still not open, but the conductor collected from plaintiff only three cents per mile to the next station where he could procure a ticket. Freight trains have seats for passengers, and conductors on this road never refuse them, if they are going to a point where the train stops. Tickets cost the same on both freight and passenger trains, and the same rules of the company govern as to passengers.

The following extracts from the regulations of the railroad commission were introduced:

"Passenger Class A includes the following: Those portions of the Georgia Railroad between Augusta and Atlanta. On and after February 1, 1881, the passenger rates shall not exceed, for any one passenger, with 100 pounds of baggage, on railroads in Class A, three cents per mile.

"6. The regulations of railroads as to passengers without tickets are matters of policy, with which the commissioners will only interfere upon complaint of abuse. An extra charge of more than

one cent a mile, full rate, or one half cent, half rate, is regarded as excessive, unless such extra charge would fall below the minimum above given.

"Standard Passenger Tariff.—For a passenger, with baggage not exceeding 100 pounds, the rates per mile shall not exceed the following, viz.: For passengers twelve years old and over, on roads in Class A, 3 cents per mile. No more than these rates for passengers shall be charged, when the ticket office shall not have been open for a reasonable time before the departure of a train from a station."

The following extracts from the rule-book of the road, under the head of "Instruction to Conductors," were introduced:

"2. From all passengers not presenting tickets, or other proper evidence of their being entitled to passage, conductors will, in every case, charge the full amount, as given under the head of train rates.

"19. The attention of agents and conductors is especially called to the following rule of the railroad commissioners, which must be strictly adhered to: No more than the lowest rate specified shall be charged, when the ticket office shall not have been open for a reasonable time before the departure of a train from a station."

The jury found for the plaintiff $16.50. He moved for a new trial, which was refused, and he excepted.

C. F. Foster; H. T. & H. G. Lewis, for plaintiff in error.

J. B. Cumming; Billups & Hardeman, for defendant.

HALL, J.—The only question which we deem it essential to consider in this case is, whether the regulations promulgated by the railroad commissioners, fixing the rates of fare for passengers who obtain tickets from the agents of the companies, at their depots, as well as for those who neglect to supply themselves with such tickets, and prescribing the manner in which ticket offices shall be kept open before and at the arrival of trains, so as to afford those who intend to take passage an opportunity of procuring tickets, are applicable to such as take passage on freight trains. The court below was of opinion that they did. In this, we think there was error. But the error was against the defendant, and it makes no complaint on that score, and, although the defendant would have been entitled to a new trial, yet if it chooses to acquiesce in the finding, the plaintiff cannot be heard to complain of a ruling that inured to his benefit. 27 *Ga.*, 358. The regulations in question apply, *ex vi termini*, as well as by the subject-matter, exclusively to rates of fare, as it seems to us, on regular passenger and not on freight trains.

COMMISSIONERS' REGULATION NOT APPLICABLE TO PASSENGERS ON FREIGHT TRAINS.

The carrying of passengers on freight trains is not compulsory

upon the company, either by law or by any rule of the railroad commission, to which our attention has been called. These several trains are run for distinct and different purposes; the one for the transportation of freight, the other for the transportation of passengers. From aught that appears to the contrary, it would seem to be the policy of both of the companies and the commission, to keep these branches of transportation distinct, and whether this policy be right and prudent or otherwise, it is not for courts to determine. Is the regulation reasonable and in accordance with law? If so, that is an end of the matter. The evidence shows nothing against its reasonableness, and nothing occurs to us why it is not lawful.

There are other questions in the case upon which it would be superfluous to pass. We express no opinion as to other portions of the judge's charge, or as to his rulings upon the admission of testimony. If they be erroneous, as alleged, they did no injury to the plaintiff, who gets as much as, or perhaps more, by this verdict ($16.50) than he appears to be entitled to.

Judgment affirmed.

STATE

v.

CHICAGO AND NORTHWESTERN R. Co.

(*Advance Case, Iowa. December* 2, 1886.)

An order of the board of railroad commissioners of the State of Iowa, made under the authority of the State, that a railway company shall so revise and alter its interstate distance tariff, so far as relates to freight shipped from points within the State to points without the State, and from points outside the State to points within the State, as to make it correspond to the Iowa local distance tariff, is contrary to section 8, art. 1, Const. U. S., and void.

APPEAL from Polk circuit court.

Action under the provisions of chapter 133 of the Laws of the Twentieth General Assembly to enforce an order of railroad commissioners. The defendants demurred to the petition. The demurrer was sustained, and the State appealed.

In the month of February, 1884, one E. Barber delivered to defendant for shipment at Morrison, in the State of Illinois (which is a station on defendant's railway), a buggy, which was consigned to himself at Glidden, which is also a station on defendant's road in this State. The buggy weighed 550 pounds, and defendant charged for its services, in transporting it to its destination, 84 cents per hundred pounds. The distance from Morrison to Glid-

den is 284 miles, and the rate charged by defendant was greater than that charged by it for the transportation of property of the same class, for the same distance, wholly within this State. Barber thereupon filed a complaint with the board of railroad commissioners of this State, alleging that the charge was excessive. The commissioners, after an investigation of the complaint was had, made the following order: "It is therefore ordered by the board of railroad commissioners, that the Chicago & Northwestern R. Co., respondent herein, so revise and alter its interstate distance tariff, so far as relates to freight shipped from points within this State to points without this State, and from points outside this State to points within the State, as to make it correspond to the Iowa local-distance tariff, which it is here assumed is arranged on a sufficiently remunerative basis." Defendant was notified of this order, but refused to obey it. The board of railroad commissioners thereupon remitted its proceedings to the attorney general of the State, who instituted this suit under the provisions of chapter 133, Laws Twentieth General Assembly, for the enforcement of said order. The circuit court sustained a demurrer to the petition, and from that order the State appealed.

A. J. Baker, Atty. Gen., for the State.

Hubbard, Clark & Dawley, for defendant.

REED, J.—The ground of the demurrer to the petition is that the order of the board of railroad commissioners is an attempt, under the authority of the State, to regulate commerce between points within this State and points without the State, and is contrary to that provision of section 8 of article 1 of the constitution of the United States which confers upon the congress of the United States the power "to regulate commerce with foreign nations, and among the several States." The defendant operates a number of lines of railway, one of which extends from Chicago, in the State of Illinois, across this State to its western boundary. Other lines, operated by it, extend into the States of Michigan, Wisconsin, Minnesota, and Nebraska, and the Territory of Dakota. Each of these lines connect, at some point, with the line through this State. It also has in this State lateral and connecting lines, which connect remote districts of the State with its main line.

QUESTION.

The effect of the order in question is to prescribe a fixed and definite schedule of charges for the transportation of property between the points in this State which are reached by defendant's lines of railway and those to which they extend in the other States and Territory named. The question presented is whether the order amounts to a regulation of commerce among the States, within the meaning of the provision of the federal constitution quoted above. When this cause was

ORDER AMOUNTS TO REGULATION OF INTERSTATE COMMERCE.

submitted in this court the exact question here involved had not been determined by the supreme court of the United States; but since its submission the question came before that tribunal in the case of Wabash, St. L. & P. R. Co. *v.* Illinois, 26 Am. & Eng. R. R. Cas., 1. The case arose under a statute of the State of Illinois which prohibited railroad corporations, doing business in the State, from charging or receiving, for the transportation of freight or passengers, the same or a greater sum for any distance than was charged for a greater distance, and prescribed certain penalties for the violation of the provisions of the act. The supreme court of the State held that the statute was applicable to contracts for the transportation of freight from points within the State to points in other States. 104 Ill. 476. The cause was removed by writ of error to the supreme court of the United States, and that court held, in an opinion filed October 25, 1886, reversing the judgment of the Illinois court, that a statute of a State, intended to regulate or to tax or to impose any other restriction upon the transmission of persons or property from one State to another, is not within the class of legislation which the States may enact, and is void. 7 Sup. Ct. Rep. 4. The question being one of the construction of the constitution of the United States, the holding of that tribunal is binding in every other court in the land. The judgment of the circuit is in accord with that holding. It is also in accord with the holding of this court in Carton *v.* Illinois Cent. R. Co., 59 Iowa, 149.

Affirmed.

BECK, J.—I concur in the decision announced in the foregoing opinion, in obedience to the authority of the ruling of the United States supreme court in Wabash, St. L. & P. R. Co. *v.* Illinois, 26 Am. & Eng. R. R. Cas. I do not concur in any arguments which have been urged in the support of the doctrines upon which the decision is based, and am now of the opinion that, in the absence of the decision of the supreme court of the United States just mentioned, the law ought to be settled the other way. But judicial subordination will not permit me to hesitate in following the decision of that court, the final arbiter of questions involving the authority of the States to control railroad corporations for the purpose of aiding commerce, and protecting it against exactions and burdens imposed by these common carriers. However, I am not so restrained by judicial subordination that I may not express regret and disappointment that the United States supreme court has abandoned doctrines and rules which, I think, the profession and judiciary of the country generally regarded as recognized and settled by prior decisions of that high tribunal.

What Amounts to Regulation of Interstate Commerce.—See Wabash, etc., R. Co. *v.* People, and note, 26 Am. & Eng. R. R. Cas. 1–29.

GRAND TRUNK R. CO. OF CANADA *v.* VOGEL.

GRAND TRUNK R. CO. OF CANADA *v.* MORTON.

(11 *Supreme Court of Canada*, 612.)

A dealer in horses hired a car from the Grand Trunk R. Co. for the purpose of transporting his stock over their road, and signed a shipping note by which he agreed to be bound by the following, among other, conditions:

"1. The owner of animals undertakes all risks of loss, injury, damage, and other contingencies, in loading, &c.

"3. When free passes are given to persons in charge of animals, it is only on the express condition that the railway company are not responsible for any negligence, default, or misconduct of any kind, on the part of the company or their servants, or of any other person or persons whomsoever, causing or tending to cause the death, injury, or detention of any person or persons travelling upon any such free passes—the person using any such pass takes all risks of every kind, no matter how caused."

The horses were carried over the Grand Trunk Railway in charge of a person employed by the owner, such person having a free pass for the trip; through the negligence of the company's servants a collision occurred by which the said horses were injured.

Held, Per Ritchie, C. J., and Fournier and Henry, JJ., that under the General Railway Act, 1868 (31 Vic. ch. 68), sec. 20, subsec. 4, as amended by 34 Vic. ch. 43, sec. 5, re-enacted by Consolidated Railway Act, 1879, (42 Vic. ch. 9,) sec. 25, subsecs. 2, 3, 4, which prohibited railway companies from protecting themselves against liability for negligence by notice, condition, or declaration, and which applies to the Grand Trunk R. Co., the company could not avail themselves of the above stipulation that they should not be responsible for the negligence of themselves or their servants.

Per Strong and Taschereau, JJ., that the words "notice, condition or declaration," in the said statute, contemplate a public or general notice, and do not prevent a company from entering into a special contract to protect itself from liability.

APPEAL from a decision of the Court of Appeal for Ontario, (10 Ont. App. R. 162,) reversing the judgment of the Divisional Court in favor of the defendants (2. O. R. 197).

There is no difference in these two cases as to the points in dispute between the parties, and the following statement of facts will suffice for both.

In Morton's case there were other goods shipped besides the horses.

The plaintiff shipped a car load of horses by defendant's railway from Belleville to Prescott; the shipping note contained the following clauses:

"1. The owner of animals undertakes all risk of loss, injury, damage, and other contingencies, in loading, unloading, transportation, conveyance, or otherwise howsoever, no matter how caused.

"2. The railway company do not undertake to forward the ani-

mals by any particular train, or at any specified hour; neither shall they be responsible for the delivery of the animals within any certain time or for any particular market.

"3. When free passes are given to persons in charge of animals, it is only on the express condition that the railway company are not responsible for any negligence, default, or misconduct of any kind, on the part of the company or their servants, or of any other person or persons whomsoever, causing, or tending to cause, the death, injury, or detention of any person or persons travelling upon any such free passes, and whether such free passes are used in travelling on any regular passenger train, or on any other train whatsoever, the person using any such pass takes all risks of every kind, no matter how caused."

The train to which the car containing plaintiff's horses was attached collided with another train a few miles from the place of delivery, and the horses were injured; the plaintiff suffered loss from not being able to sell a number of his horses, and from delay and extra expense in getting them to Prescott.

It was not disputed that the servants of the railway company were guilty of negligence, and the measure of damages for which plaintiff, if defendants were liable at all, should have judgment, was agreed to at the trial.

The two causes were tried separately and resulted differently, in Vogel's case a verdict being entered for the defendant, which was reversed by the Divisional Court, and in Morton's case the verdict being entered for the plaintiff for the loss of the goods other than the horses and sustained by the Divisional Court; the judgment of the Divisional Court was, in both cases, sustained by the Court of Appeal, from whose decision the defendants appealed to the Supreme Court of Canada.

Osler, Q. C., and *McCarthy*, Q. C., for appellants.

Dickson, Q. C., for respondent Vogel, and *Ermatinger* for respondent Morton.

Sir W. J. RITCHIE, C. J.—The question to be decided in these cases, is whether or not the defendants were at liberty to protect themselves from liability by the terms of the special contract.

The Consolidated Railway Act, 1879, sec. 25 sub-sec. 4, provides:

"The party aggrieved by a neglect or refusal in the premises shall have an action therefor against the company, from which action the company shall not be relieved by any notice, condition or declaration if the damage arises from any negligence or omission of the company or of its servants." STATUTORY PROVISIONS.

Sec. 2, sub-sec. 2, makes the above provision applicable to every railway constructed, or to be constructed, under the authority of any act passed by the Parliament of Canada.

This act repeals the Railway Act of 1875 (38 Vic. ch. 24) which has been held to apply to the Grand Trunk R., but enacts in the repealing clause that:

"All things lawfully done, and all rights acquired under the acts hereby repealed, or any of them, shall remain valid, and may be enforced, under the corresponding provisions of this act, which shall not be construed as a new law, but as a consolidation and continuation of the said repealed acts."

POSITIONS TAKEN BY LOWER COURTS.

At the trial, Wilson, C. J., gave judgment for the defendants (in Vogel's case) after assessing the damages to enable the plaintiff to obtain a verdict without a new trial; the learned judge held that the Consolidated Railway Act, 1879, did not apply to this company.

The Divisional Court reversed this judgment, and ordered a verdict to be entered for the plaintiff for the damages assessed.

The Court of Appeal were divided in their opinion, and the verdict sustained; Burton and Patterson JJ., who dissented from the judgment of the Divisional Court, held that, even if the Consolidated Railway Act applied to the company, they were still not debarred from making a special contract to relieve them from liability.

After a careful examination of all the statutes bearing upon this case, I agree with Mr. Justice Osler:

"That these defendants are subject to the statutory law which takes away the defence in an action of this kind where the loss has been occasioned by the negligence of the company or its servants."

The statutory obligation imposed upon a railway company is:

"To start trains at regular hours, and to furnish sufficient accommodation for the transport of all passengers and goods, &c., and any party aggrieved by any neglect or refusal in the premises shall have an action therefor against the company, from which action the company shall not be relieved by any notice, condition, or declaration, if the damage arises from the negligence or omission of the company or its servants."

STATUTORY OBLIGATION IMPOSED ON COMPANY.

Any neglect or refusal in the premises. What are the premises? To take, transport and discharge, *inter alia*, such passengers and goods, upon payment of the freight or fare legally authorized therefor; if the goods then are not transported and discharged, by reason of any neglect or refusal, clearly an action lies; and is there any difference whether the neglect is in not providing sufficient accommodation, or in not sending the goods forward in the first instance, or having sent them forward in not transporting them to, and discharging them at, the place of destination, but so negligently dealing with them that such transport and discharge was prevented?

I think the object of the legislation was to prevent railway com-

panies from escaping liability by entering into contracts whereby they could free themselves from liability for the neglect of themselves or their servants, whether by way of notice or condition or declaration, be the same by way of contract or otherwise; in other words, to prevent them from contracting themselves out of liability for negligence. To limit the clause as contended for would, in my opinion, entirely frustrate the intention of the legislature, or enable the companies to do so with impunity.

I think, therefore, the appeal in this case should be dismissed.

STRONG, J.—The first difficulty we have to deal with in deciding this appeal, is to ascertain the legislation actually in force; there have been so many alterations in the statutes, and these alterations have been effected in such a slovenly manner, that it requires frequent perusals and much comparison of the different enactments, before it is possible to say what has been repealed and what remains standing, all of which, with a little pains and care in the arrangement of the statutes, might have been ascertained at a glance. STATUTORY ENACTMENTS IN FORCE.

By the General Railway Act of the Dominion, 31 Vic. ch. 68, passed in 1868, it was enacted by the 20th sec. as follows:

"Sub-sec 2.—The trains shall be started and run at regular hours to be fixed by public notice, and shall furnish sufficient accommodation for the transportation of all such passengers and goods as are within a reasonable time previous thereto offered for transportation at the place of starting and at the junctions of the railways, and at usual stopping places established for receiving and discharging way passengers and goods from the trains.

"Sub-sec. 3.—Such passengers and goods shall be taken, transported and discharged, at, from and to such places, on the due payment of the toll legally authorized therefor.

"Sub-sec. 4.—The party aggrieved by any neglect or refusal in the premises shall have an action therefor against the company."

By the fifth section of 34 Vic. ch. 43 (passed in 1871), the 4th sub-sec. of sec. 20 of the act of 1868 was amended by adding the following provision:

"From which action the company shall not be relieved by any notice, condition or declaration, if the damage arises from any negligence or omission of the company or its servants."

So far, the enactments just set forth were not applicable to the Grand Trunk R. Co., but by the 38 Vic., ch. 24 (passed in 1875), the General Railway Act was further amended, and by sec. 4 it was declared that:

"This act and the 50th sec. of the Railway Act, 1868, as hereby amended, and sec. 20 of the Railway Act of 1868 as amended by sec. 5 of the Act 34 Vic., cap. 43, shall apply to every railway company heretofore incorporated, or which may hereafter be incor-

porated, and which is subject to the jurisdiction of the Parliament of Canada."

The Grand Trunk R. Co. was and is, beyond question, a railway subject to the jurisdiction of the Parliament of Canada, inasmuch as it is a railway excluded from the jurisdiction of provincial legislatures by sub-sec. 10, of sec. 92 of the British North America Act, as being a railway extending beyond the limits of any single province.

In 1879 the Railway Act of 1868, as amended by the subsequent enactments before mentioned, was, by the statute of 42 Vic. ch. 9 sec. 102, repealed, but by the 2nd, 3rd and 4th sub-secs. of sec. 25, the foregoing provisions of the act of 1868, as amended by the act of 1871, were re-enacted, the whole act was not made applicable to all railways subject to the jurisdiction of the Parliament of Canada, but only to such railways as had been, or should be, constructed under the authority of any act passed by the Parliament of Canada, by which expression I understand the Parliament of the Dominion. By the 100th sec., however, it was declared that sub-sec. 4 of sec. 25 should "apply to every railway company theretofore incorporated, or which might thereafter be incorporated, and subject to the jurisdiction of the parliament of Canada," a provision which manifestly included the Grand Trunk R. Co. Therefore we have, as applicable to the present appellants, this sub-sec. 4 of sec. 25, standing alone, not preceded by the 2nd and 3rd sub-secs. which it had followed in the act of 1868, as amended by the act of 1871.

Although this was undoubtedly a very clumsy and confused mode of expressing the intention of the legislature, it still appears to me that sub-sec. 4 can easily be construed in the same way the courts below have construed it, by reading into it, in substitution for the words "the premises," the provisions of the foregoing subsections of sec. 25 of the act of 1879; and so read, its effect will be precisely the same as if sub-sec. 4 and all the sub-clauses of sec. 25 which precede it, were set forth *in extenso*. To say that a party shall have an action for any refusal or neglect to take, transport and discharge goods, is equivalent to saying that it shall be the duty of the railway company to take, transport and discharge goods, and that the party aggrieved by any neglect or refusal so to do shall have an action therefor. Sub-sec. 4, therefore, read alone but construed in the way suggested, imposes upon the railway company the duty of taking, transporting and discharging goods offered for carriage; the effect of this legislation must therefore be to make a railway company to which it applies common carriers of goods; or, at least, to impose upon them the same duties in regard to receiving, carrying and delivering as those to which, by the common law, common carriers are subject in respect of the carriage of goods.

If I did not think this appeal would be decided on other grounds, I should have had to consider whether the word "goods" used in this statute included horses and cattle and other live stock, a point on which my first impression is altogether against the plaintiff; as it appears to me, however, that the case may be disposed of on other grounds, I need not enter upon this consideration.

MEANING OF "GOODS."

It cannot be doubted that clause 17 of the special contract under which the horses were carried in both cases was, in its terms, quite sufficient to exempt the railway company from liability for "loss, injury, or damage" happening to the animals in the course of transit, though such injury should be caused by the negligence of the appellants' servants, unless the statutory provision in question invalidates the stipulation for such exemption; the cases referred to in the judgment of Chief Justice Moss, in the case of Fitzgerald *v.* The Grand Trunk R. Co. (4 Ont. App. R. 601), are cited by Mr. Justice Patterson as sufficient authorities for this proposition, in which I agree with him. It is equally clear from the decisions in the same case of Fitzgerald *v.* The Grand Trunk R. Co. (*ubi supra* and 5 Can. S. C. R. 209), that the document signed by the plaintiff in Morton's case having the caption of "Release and Guarantee," is insufficient for this purpose, and that the company are not thereby exonerated from the consequences of accidents happening through the negligence of their servants. That the injuries in both these cases did arise from the palpable neglect of the company's servants is a fact which is not and could not have been disputed.

LIABILITY OF COMPANY FOR INJURY TO ANIMALS UNDER SPECIAL CONTRACT.

What we have to determine, then, in order to decide this appeal, may be included in two questions, stated as follows:

First. Does this statutory prohibition of exemption from liability apply at all to a case like the present, where the goods were not received by the railway company in the ordinary way as common carriers, to be loaded by the company's servants, actually placed in their possession, and carried under their care and supervision, but under a special contract for the hire of a car, into which the plaintiff was to be at liberty to put as many or as few horses as he chose, which, during transit, were to remain in the possession, and to be under the exclusive care, of the plaintiff or his servants, thus differing from the ordinary contract impliedly entered into by a common carrier, who receives into his own possession goods tendered to him for carriage?

QUESTIONS TO BE CONSIDERED.

Secondly, assuming that the statute does apply, and that we must consider these horses as having been tendered to, and received by, the appellants to be carried as common carriers, and subject to all the obligations and responsibilities which attach to such carriers, is there anything in the 4th sub-sec. of sec. 25 which invalidates a special contract expressly entered into and signed by

the consignor, restricting the ordinary common law or statutory liability of the carrier?

For the purpose of determining these questions, I of course assume that the horses are "goods" within the meaning of the statute, though I repeat I do not intend so to decide.

VALIDITY OF CONTRACT BETWEEN CONSIGNOR AND COMPANY.

Although the order in which these questions are above propounded is the more natural and logical, yet it will be convenient first to consider that last stated. The solution of this, it is evident, must depend on the interpretation to be placed upon the latter part of the 4th sub-sec., or rather, upon the meaning of the words "notice, condition or declaration" there contained. The Queen's Bench Division and the Court of Appeal (the judges in the latter court being equally divided) have held that these words do comprise special contracts expressly entered into and signed by the consignors, as in the present instance. After giving the well-considered judgment delivlivered by the learned Chief Justice in the Queen's Bench Division, and by Mr. Justice Osler in the Court of Appeal, the most attentive and respectful consideration in my power, I am compelled to differ from the conclusion at which they arrived.

As before stated, the effect of sub-sections 3 and 4 of sec. 25, so far as regards the receipt, carrying and delivery of goods, imposes no other or greater obligations on the railway companies subject to it than it would be liable to at common law if it had been itself a common carrier of the particular goods in question. In the view which I take, it is not necessary to decide whether it sufficiently appears from the evidence that the Grand Trunk R. Co. had so generally dealt with the public, and held itself out, as to make it, at common law and independent of statutory enactments, a common carrier of horses and other live stock; I will, however, assume, for the present purpose that not only are horses "goods" within the meaning of that word in the statute, but that the Grand Trunk R. Co. are proved to be common carriers of horses at common law. If it were necessary to decide this last point, I should, however, at least share the doubt expressed by Chief Justice Cameron.

PLAINTIFFS NOT ENTITLED TO RECOVER FOR INJURIES TO HORSES.

Then conceding that these horses were delivered into the possession of the railway company, and were actually received by them to be carried as common carriers upon the terms stipulated by the company contained in the 17th clause of the special contract, and that the 4th sub-section was applicable, I must still hold that the plaintiffs in these cases are not entitled to recover so far as respects the injuries to the horses. I have no doubt that the word "neglect" has reference to negligence in carrying as well as negligence in omitting to carry; this, indeed, is implied in what has been already said—that the intention of the legislature was merely to impose on the rail-

way company the liability of a common carrier. The grounds upon which I rest my judgment in this aspect of the case are that the words "notice, condition or declaration" do not bear the construction that the court below has put upon them; that, on the contrary, they must be restricted in the way Mr. Justice Burton has pointed out; that they do not mean terms expressed in a special contract actually signed by the consignor, but in the language of Mr. Justice Burton, "terms, published by the company, of their own act and will, on which they are willing to carry goods."

Allusion has been made in the judgments of some of the learned judges in the court below, to the history of the law in England as regards the restriction by carriers of their general common law liability by special contracts. At common law it was always within the powers of common carriers to relieve themselves by contract from the onerous responsibilities which the law, for reasons once practical, but long since become historical, cast upon them. This freedom of contract was, however, found to be liable to abuse, inasmuch as carriers published general notices and conditions on which they announced they would alone accept goods to be carried, which notices and conditions, it was held, were, if so published that knowledge of them might reasonably be imputed to consignors, considered as imported into, and made part of, the contract for carriage; this was thought an unreasonable state of the law, not because it was considered unreasonable that carriers should be at liberty to relieve themselves from liability by contract, but because it was considered unfair that they should do so in this indirect way. To remedy this, the first Carriers Act, 11 Geo. 4th and 1 Will. 4th, ch. 28, was passed, which qualified this power of limiting liability by notice. In the 4th section of this Act we find the words "public notice and declaration" used in a proviso that such notices and declarations shall not, save in certain cases, have the effect of relieving from responsibility. I merely point this out as showing from whence the expression "notice, condition, and declaration," used in this sub-section 4, now under consideration, is originally derived, and that it is, in this first Carriers Act, used in connection with the word "public."

LIMITATION OF LIABILITY—HISTORY OF LAW IN ENGLAND.

In the next legislative regulation of carriers' contracts which was applied in England, "The Railway and Canal Traffic Act, 1854," which was passed after the whole system of the inland carrying trade in England had been changed by the construction and use of railways, we find in the 7th section these same words now under consideration, "notice, condition, or declaration." The first part of that section is as follows:

"Every such company as aforesaid shall be liable for the loss of, or for injury done to, any horses, cattle, or other animals, or to any articles, goods, or things, in the receiving, forwarding, or de-

livery thereof, occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition, or declaration made or given by such company contrary thereto or in any wise limiting such liability, every such notice, condition, or declaration being hereby declared to be null and void."

The construction placed on these words by the English courts has been that the words "notice, condition, or declaration" refer to general notices, and do not exclude the right to make special contracts. Thus Jarvis, C. J., in Simons *v.* The Great North-Western R. Co., 18 C. B. 805, referring to the effect of this part of the section, says:

"General notices to limit liability shall be null and void, but the company may make special contracts with their customers provided they are just and reasonable."

This last observation, of course, refers to the latter part of the section 7, and has no application here. The purpose for which I refer to this section, and the construction which has been placed upon it in England, is to show, in the first place, that these words which we find in our own statute, and which we are now called upon to construe, were borrowed from the English Act, and therefore we are entitled to presume that it was intended they should have the same meaning here as was placed upon them there by the English courts, namely, that it was intended by the expression to exclude a limitation of liability by general notices, and that it was designed for this purpose only.

"NOTICE, CONDITION, OR DECLARATION" CONSTRUED.

It is not necessary, however, to have recourse to the decisions of the English courts as establishing the proper construction of these words; taking these words "notice, condition, or declaration" by themselves, without assistance from any authorities, it seems apparent that they are not sufficient to disentitle the railway companies to the benefit of special contracts limiting their liability, especially when it is considered that it had been the universal practice of carriers to endeavor to exonerate themselves by general public notices; the words "notice and declaration" so read must, as I think every one will admit, clearly have reference to the general notices previously in use; the word "condition" may be more ambiguous, but we are surely bound to interpret it on the principle *noscitur a sociis*, and when we find it associated with words which clearly have reference to general notices, the unilateral acts of the company, we must limit, or rather fix, its import accordingly. Upon the whole, my conclusion is that the legislature, desiring to do away with general notices, adopted the phraseology which had been deemed apt for that purpose in the 7th section of the English Act of 1854, but not intending to limit parties in making special contracts to such as the courts should deem just and reasonable, but intending to leave the railway company full freedom of contract in that respect, did not, as was done by the

English Act, proceed to provide for such special contracts. I think that this construction is inevitable when we consider that it is a universal principle of statutory construction that every presumption must be made against an intention to interfere with the freedom of contract, and when we advert to the serious consequences which would follow if railway companies were not allowed to protect themselves, to some extent, against liability for loss even from the negligence of their own servants, by fair and reasonable conditions applicable to the conveyance of property of extraordinary value, I cannot think that any such intention existed.

But I place my judgment not so much upon this consideration, as upon the utter inadequacy of the words of the Act of Parliament to warrant such an interpretation.

I am therefore of opinion that, making all the assumptions in the plaintiff's favor which have been stated, and treating the appellants in these cases as common carriers, there was nothing in the statute law to preclude them from qualifying their liability in the way they have done by the stipulations contained in these contracts.

Next we have to consider whether the appellants can be considered as coming within the provision contained in the 4th sub-section of section 25 of the statute of 1879. I venture to say that they cannot be so considered; in the first place, it is plain, upon the evidence taken in connection with the terms of the special contracts, signed by the parties, that the railway company never were in possession of the horses in question, which always, while in the car provided by the company for their carriage, were in the possession of their respective owners. I take it to be essential to the liability of a common carrier that he should be entrusted with the possession of the property carried, and that when the possession is retained by the owner the liability is so modified that it is no longer open to the owner to insist on any greater responsibility than that which in all cases attaches to acts of negligence, and which liability may therefore be excluded by contract without reference to any restriction on the liberty of contracting applicable to common carriers.

LIABILITY OF CARRIER WHEN OWNER RETAINS POSSESSION OF GOODS.

Again, viewing this, as Mr. Justice Burton puts it, as an action on the statute, the liability to the action given by the 4th subsection and the disability which is imposed as to escaping from such liability by "notice, condition or declaration" (even if we interpret these words as including "contract") only applies to goods "taken" by the railway company for transportation, the word "taken" as here used manifestly meaning taken into the possession of the railway company. The cases which have been decided as to passengers' luggage seem therefore not without application here. It has been held that railway companies are to be deemed common carriers of a passenger's luggage entrusted to the

care of their servants, but that if the passenger chooses to retain control of the luggage himself, the company is not to be considered as common carriers of it, but is liable only for loss by actual negligence. This argument is not, I conceive, met in the present case by the terms of the contract which acknowledges the receipt of the horses, a receipt being always susceptible of explanation, and here the evidence shows, beyond all question, that the horses from the time they were shipped were under the care and control of the owner, who was carried upon a free pass, expressly in order that he might have such care and control.

The true legal definition of the contracts entered into in these cases by the plaintiffs with the appellants was, I conceive, that propounded by Mr. Justice Patterson, namely, that the company let to hire to the plaintiffs a railway car for the carriage of horses, leaving it to the plaintiffs to load such cars with as many horses as they might think fit, and further agreed to draw such cars in their trains. Such being the effect of the agreement between the parties, the railway company could no more be said to be in the possession of the horses than could the owners of a steam tug employed to tow a ship be said to be in possession of the cargo. A class of cases decided on charter parties may also be referred to, not, perhaps, as affording analogy from which it would be safe to reason, but as illustrating the nature of the relationship between the railway company and the owners of the property in the present case. It has been held that when, by a charter party, the owner retains control of a ship, the master and crew being in his employ, he is to be deemed to be in possession of the cargo which, through his servants, is in such cases under his care and control, the contract only giving the charterer the right to the use of the ship for the carriage of his goods; but when the charter party amounts to a demise of the vessel, as it is held to be when the master and crew are employed by the charterer, the ship-owner is not considered as in possession of the cargo or liable in any way for it. It is no answer to this to say that no care of the owner could have prevented the injury in the present case; the argument based on the possession being retained by the owner is only used to show that the property here was not carried by the defendants either as common carriers or under the statute, not as showing that the appellants would not have been liable for the negligence of their servants if there had not been a contract exonerating them from such responsibility; in other words, the appellants' liability depends on whether they carried as common carriers, either at common law or under the statute, and this they cannot be said to have done if they had not possession of the horses; so that possession becomes the test of the legal validity of the stipulation which they exacted, that they should not be so liable.

SAME—ILLUSTRATION FROM CHARTER-PARTY CASES.

It is, in my opinion, sufficient to show that the case has not been brought within the terms of the statute literally construed, that is, construed as in any case we are bound to construe a statute, but more especially so bound when it is sought, as here, to impose legislative restrictions on the right of contracting freely; and therefore the consequences of such a construction would be of insufficient weight to authorize us to depart from the plain meaning of the words of the enactment. But no difficulty arises from the consideration that unreasonable or unjust consequences are likely to arise in the present case; if an owner wishes his horses carried by the railway company as common carriers, all he has to do is to tender them for transportation, and upon the payment of the proper charges the company will be bound to carry them if they are to be deemed generally common carriers, or if the statute applies to such property. On the other hand, by holding that under a contract like the present the railway company are unable to qualify their liability, we should go far towards invalidating the arrangements under which a most important branch of the inland carrying trade is now carried on; I allude to the arrangements between express companies and railway companies. If we held the appellants incapacitated from discharging themselves from liability by contracts like the present, upon what principle can it be said that the railway companies, within the statute of 1879, can exempt themselves by contract, as they always assume to do, from liability to express companies in respect of the goods and property carried by the latter; in the case of express companies the goods are under the care and control of their servants to no greater degree than the horses in the present case were under the care of their owners; in each case the car is the property of the railway company, and in both alike the agreement between the parties is resolvable into a contract to let to hire a car and to haul it. This consideration, in my judgment, greatly strengthens the construction which the mere words of the Act seem to call for.

CONSEQUENCES ARISING FROM PRESENT CONSTRUCTION.

Again, it is more for the convenience of the public that valuable property, such as horses and live stock, should be conveyed in this way, under the care and control of persons used to their management, than that it should be left to the servants of the railway company to attend to their wants in respect of food and water and their transhipment when called for.

It may be that an improvement in the law would be wrought by an amendment making it incumbent on the courts to determine whether special contracts are reasonable or not, as was done in England by the Act of 1854; but against the good policy of such enactments we have the high authority of some of the Lords who heard the late case of The Manchester R. Co. *v.* Brown, 8 App. Cas. p. 703, particularly that of Lord Bramwell. Upon the whole I do not see that any

IMPROVEMENT IN LAW—JUDICIAL DETERMINATION OF REASONABLENESS OF CONTRACT.

great public inconvenience will result from holding that the 4th sub-section of the statute of 1879 does not apply to special contracts, provided consignors will take the trouble to read the special contracts which are presented for their signatures. As the Chief Justice remarked at the trial, if people will not read these conditions, it is their own fault if they operate as a surprise upon them when a loss takes place.

What is before said has, of course, reference only to the horses; as regards the other goods in Morton's case the appellants are liable for the loss in that respect upon the general ground of negligence, though they carried not as common carriers, nor under the statute, but under the special contract, inasmuch as the document headed "Release and Guarantee" did not, as before pointed out, exonerate them from such liability. In Morton's case the verdict should therefore be entered for the plaintiff for $89. The learned judge who heard Morton's case discharged the jury and found that the horses were carried under the special contract; in Vogel's case, however, the jury expressly found that the horses were not carried under the special contract, "unless so far as that answer was qualified by their answer to the third question." The answer to the third question is that the plaintiff supposed the terms of the request note and shipping bill were of the like nature as those of other papers he had signed for the carriage of horses by the Grand Trunk.

COMPANY LIABLE FOR LOSS OF OTHER GOODS BESIDES HORSES.

I suppose that, strictly speaking, the question should have been left to the jury, whether Fanning signed the request note as the agent for the plaintiff, but this fact was not disputed; nor was it disputed that the horses were carried under the contract, nor pretended that they were carried under any other contract than that contained in the request note and shipping bill. Under the Judicature Act we may, I think, supply this finding; rule 321 seems to authorize this, and the corresponding English rule has been so applied. It would appear, therefore, that notwithstanding the finding of the jury, effect may be given to the law as before stated applied to the facts in evidence, without going through the useless formality of another trial.

My conclusion is, therefore, that the appeal should be allowed with costs in both courts, and judgment entered for the plaintiff for $89 in Morton's case and for the defendants in Vogel's case.

FOURNIER J. concurred in the judgment delivered by the Chief Justice.

HENRY J.—I am of the opinion that the appeal should be dismissed in both the cases. I think in one of the cases there was a reduction made for the carriage of the horses.

My opinion is that in both cases the party is entitled to recover the whole of the loss. I think the special agreement did not alter

the liability, and that the party is entitled to recover not only for the other goods, but also for the horses.

TASCHEREAU J.—I would have allowed these appeals for the reasons given by Burton and Patterson JJ. in their dissenting opinions in the court below. I can see nothing in the statute to prevent this company from making special contracts for the carrying of goods. Why should parties desirous of making such contracts be deprived of their common law right to do so? If, for instance, a party wants a special train—hires a special train—to carry his goods, can he not make a special contract with the company about it? Has the legislature deprived him of that right? It would require express words to bring me to the conclusion that they have done so. I cannot find them in the statutes. Here it was a special car that the plaintiff hired. He made a special contract for it with the company. One of the conditions of that contract was that the company should not be liable for damage occasioned by accident. I can see nothing illegal in such a condition, as the statutes stand.

Appeals dismissed with costs.

Extent to which Common Carrier may Limit His Liability.—See note to Ball *v.* Wabash, etc., R. Co., 25 Am. & Eng. R. R. Cas. 388.

COMMONWEALTH

v.

HOUSATONIC R. Co.

(*Advance case, Massachusetts. January* 7, 1887.)

The Statutes of 1885, *c.* 338, §2, providing that the railroad commissioners may fix the rates of freight to be charged by a railroad company between points outside the State and points within the State, violates article 1, §8, of the United States constitution, which provides that congress shall have the exclusive power to regulate "commerce among the several States," and is invalid.

Tort to recover a penalty as provided in section 2 of chapter 338 of the acts of 1885. Trial in the superior court, before BARKER, J., where judgment was entered for the plaintiff, and the case reported to the supreme judicial court. The facts are stated in the opinion.

Justin Dewey for defendant.

George F. Hoar for the Commonwealth.

MORTON, C. J.—St. 1885, *c.* 338, provides, in the second section, that the board of railroad commissioners "may fix a maximum charge and rate for any freight received in Massachusetts by said Housatonic R. Co., for transportation to and delivery at any other point or place, and for any freight received by said company at any point or place for transportation to and delivery at any place in Massachusetts; and such orders shall be binding upon said company, and said Housatonic R. Co. shall not receive or demand any greater sum for such transportation and delivery than the amount so fixed as a maximum." As the first section provides for fixing rates between any points in Massachusetts, we think it clear that the purpose of the second section was to provide for fixing rates between points outside the State and points within the State. Otherwise it is useless. The fourth section provides a penalty for any violation of the statute, to be recovered in an action of tort.

STATUTORY PROVISIONS.

Acting under the authority of the statute, the railroad commissioners, on July 25, 1885, passed an order fixing the maximum rates which the Housatonic R. Co. might charge for the transportation of certain kinds of freight between various points or places in the State of Massachusetts and other points or places in the State of Connecticut. This action is brought to recover the penalties provided by the statutes for several violations of this order by the defendant corporation, each count alleging that the defendant unlawfully charged and received more than the maximum rate fixed by the order for the transportation of the freight therein named, between Lee, in the State of Massachusetts, and Bridgeport, in the State of Connecticut.

The defendant contends that the second section of the statute of this State, which we have quoted above, is invalid, because it violates the eighth section of the first article of the constitution of the United States, which provides that congress shall have the exclusive power to regulate "commerce among the several States." This question is conclusively settled by a recent decision of the supreme court of the United States, promulgated since the case at bar was argued. A statute of the State of Illinois, enacts that if any railroad company shall charge or receive for the transportation of passengers or freight of the same class, for any distance within the State, the same or a greater sum than is at the same time charged for the transportation, in the same direction, of any passenger or like quantity of freight, of the same class, over a greater distance of the same railroad, it shall be liable to a penalty. A suit was brought in Illinois to recover the penalty for violating this provision; the declaration alleging that the defendant charged certain parties 15 cents per hundred pounds for carrying a load of freight from Peoria, in the State of Illinois, to New York, 109

STATUTE AMOUNTS TO REGULATION OF INTERSTATE COMMERCE.

miles of the distance being in Illinois, while at the same time it charged certain other parties 25 cents per hundred pounds for carrying a like load of the same class of freight from Gilman, in the State of Illinois, to New York, 23 miles of the distance being in Illinois; both places being on the line of the road. The supreme court held that the provision of the constitution giving congress the power to regulate "commerce among the several States" is exclusive; that no State has the power to pass laws regulating interstate commerce, although congress has not acted upon the subject, and that the law of Illinois, so far as it applies to the transportation of freight from places in the interior of Illinois to places in another State under one contract, is unconstitutional and invalid; such transportation being "commerce among the several States." Wabash, St. L. & P. R. Co. *v.* State, 7 Sup. Ct. Rep. 4; s. c., 26 Am. & Eng. R. R. Cas.

The principle of this case governs the case at bar. The statute of Massachusetts undertakes to fix the rates which the defendant shall charge for transportation of freight, not only within this State, but also within the State of Connecticut. It is a more clear and direct regulation of interstate transportation or commerce than is the law of Illinois against unjust discrimination. We are therefore of opinion that the second section of the statute we are considering, and the order of the railroad commissioners under it, are invalid and of no force. It necessarily follows that the plaintiff cannot maintain this action.

Judgment for defendant.

See Wabash etc., R. Co. *v.* State 26 Am. & Eng. R. R. Cas. 1.

MULLIGAN

v.

NORTHERN PACIFIC R. Co.

(*Advance Case, Dakota. October* 4, 1886.)

A railway company delivered to the owner certain goods which were in its warehouse, taking his receipt therefor. By an arrangement between the owner and the warehouseman and baggageman a part of the goods were left in the warehouse, and subsequently lost. The baggageman had no authority to make any contract for the company. *Held*, that the company was not liable for the goods lost; that the baggageman permitting part of the goods to remain in the warehouse was his private arrangement, to which the company was not a party.

APPEAL from district court, Ransom county.

Goodwin, Van Pelt & Gammons for plaintiff and respondent.

W. P. Clough and *Geo. P. Flannery* for defendant and appellant.

MCCONNELL J.—This action was brought originally in justice's court against the defendant company, as a common carrier of goods, to recover the sum of $100 damages for the loss of a box of house-
FACTS. hold goods transported for Mulligan, over its road, to Lisbon station, and by Mulligan claimed never to have been delivered. Judgment having been rendered for plaintiff in the justice's court, the defendant appealed to the district court of Ransom county, where the action was again tried, resulting in a verdict and judgment for the plaintiff. Defendant moved for a new trial upon the ground that the evidence was insufficient to justify the verdict. Said motion having been denied, judgment was duly entered, and the defendant appeals to this court.

In the consignment of goods to the plaintiff, there were five separate parcels, namely, four crates and one box. One of these crates of household goods constitutes the subject of this action. The goods reached Lisbon station, and the plaintiff applied for the goods at the station, found them there, and thereupon executed and delivered to the agent a receipt therefor. He then applied to an employee of the company at the station, named Barr, for his freight. Barr was the baggageman and warehouseman at the station. Plaintiff, living several miles distant, claimed to Barr that his transportation facilities were not equal to carrying the entire consignment at one trip, and asked him and obtained from him his consent to leaving a portion of the articles in the station until a subsequent trip. About a week later, Mulligan applied to Barr for the parcels which he had left, but one of them, forming the subject of this suit, had disappeared. It did not appear from the evidence in the case what authority, if any, Barr had to bind the company by consenting to retain the goods on storage after they had been receipted for to the station agent. It expressly appeared from plaintiff's own evidence that the station agent knew nothing of plaintiff's intention to leave the goods in the warehouse after the execution of the receipt.

In plaintiff's cross-examination he testified as follows: "*Question.* Did not Boyden, the agent, tell you, when you receipted for them when they first came, that he delivered all five packages to you. If you left them there it would be at your own risk? *Answer.* No such conversation occurred at all. When I asked him if my packages were there, he said they were. *Q.* You receipted for all five? *A.* Certainly. *Q.* Didn't he inform you that he delivered them to you. If you left them there, you left them at your own risk? *A.* No, sir; he didn't know that I was going to

leave them. *Q.* Did you have any talk with Mr. Barr at that time? *A.* Yes, sir; I told him I couldn't take them all that night. I would leave them there—take the others the next time I was in." Boyden, the station agent, in his evidence says that he was not present in the warehouse at either time when the plaintiff applied for his goods. The transaction, therefore, appears to have been this: The company, as common carrier, received Mulligan's packages at St. Paul, and transported them safely to Lisbon station, and landed them in its warehouse. After their arrival, plaintiff applied to the proper authority, namely, the agent in charge of the station, received delivery of the goods, and receipted for them. There is no pretence whatever that the goods were not all there and turned over to him. Hence the contract of the company as a common carrier was fully satisfied.

It nowhere appears that Barr had any authority to enter into any contract whatever on the part of the company, or to assume any obligation in its behalf. It expressly appears, and is admitted by the plaintiff, that the station agent, who it must be assumed possessed all the authority of the company at the station, did not even know of the plaintiff's intention to leave the parcels, or a part of them, after they had been delivered to him and he had receipted for them. It must be assumed that the transaction by which Barr consented to permit the goods to remain was simply his own private arrangement, to which the company had never become a party. If, therefore, Barr lost the goods, he lost them, not as a custodian for the company, but as the custodian of the plaintiff.

STATION AGENT HAD NO AUTHORITY TO CONTRACT FOR COMPANY.

The plaintiff failed to make out any case against the railroad company, and the verdict should have been for the defendant.

The judgment is reversed.

(All the justices concur.)

What amounts to Delivery to Consignee—When Carriers' Liability Ceases.—See S. & N. Ala. R. Co. *v.* Wood, 16 Am. & Eng. R. R. Cas. 267; Wilson Sewing Machine Co. *v.* Louisville, etc., R. Co., 6 Ib. 593; Nicholas *v.* N. Y. Cent. R. Co., 9 Ib. 103; McKinney *v.* Jewett, 9 Ib. 209; S. & N. Ala. R. Co. *v.* Wood, 9 Ib. 419.

East Tennessee, Virginia and Georgia R. Co.

v.

Hale.

(*Advance Case, Tennessee. September*, 1886.)

In an action against a railroad company for failure to deliver a car-load of mules according to a contract under which the company agreed to deliver within a reasonable time at Dalton, Georgia, the measure of damages is the difference in the market value of the stock at that point when it should have been, and when it was in fact, delivered there; and if there was no market value at that point, such value may be ascertained by proof of the market value at other convenient points.

Appeal from Circuit Court, Monroe County.
Baxter, Henderson & Joroulman for appellant.
Chambers & Pritchard and *Mr. Stephens* for S. P. Hale.

Snodgrass, J.—This was a suit on a contract to carry from Sweetwater, Tennessee, and deliver at Dalton, Georgia, a car-load of stock. The declaration filed contained a connected statement of several causes of action, treated by the parties as four counts. The first was that the defendant so negligently and carelessly carried said stock that three mules were crippled and greatly damaged; the second, that defendant failed and neglected to deliver said stock in a reasonable time, whereby plaintiff was deprived of the use of the same, and they were of much less value; third, that defendant agreed to deliver, in time for the market on the —— day of January, 1881, and defendant did not deliver in time for said market, whereby the plaintiff lost the profit that he would have made had they been delivered as agreed, etc.; fourth, that said stock was delivered to defendant to be carried to Dalton by a certain specified time, and by the carelessness and negligence of defendant, said stock was not delivered within the said time, and, through such negligence and carelessness of defendant, great injury and damage resulted to plaintiff. There were three pleas: Not guilty; not guilty within three years; and that the injury was the result of negligence of plaintiff. The verdict was in favor of plaintiff for $500, judgment thereon, and defendant appealed in error.

Facts.

The commission of referees report in favor of a reversal upon various grounds and exceptions filed upon the whole case for our consideration and final judgment. Upon the contract proven and the facts of this case, it is unnecessary to note three of the counts. There was no contract to deliver at Dalton "in time for

market on the —— day of January, 1881," or "by a certain specified time," as set out in the last two counts; nor was there any evidence whatever that the three mules were crippled between Sweetwater and Dalton, as averred in the first count; nor the amount of damages done by such crippling, which it does appear occurred at some point while their route continued. So, these three counts may be regarded as out of the way and need be no further noticed.

Treating the second averment as a good cause of action defectively stated, the case stands as a suit upon a contract, in which defendant received of complainant at Sweetwater, Tennessee, agreeing to deliver at Dalton, Georgia, within a reasonable time, a carload of stock, which it negligently and carelessly failed to deliver as agreed and, during the delay occasioned by such negligence, the stock depreciated, to plaintiff's damage $1000. The only damage recoverable under this declaration would be the difference in the market value of the stock at Dalton, Georgia, when it should have been and when it was in fact delivered there. In the evidence, the plaintiff tried to make out a case of damages resulting to him for failure to reach, in proper time, the market at Madison, Georgia, to which point the stock was consigned, and where it appeared by some incompetent testimony admitted, he had a contract for the sale of certain mules of a description which he thought his would fill. But it will be remembered he had made no such case in the pleadings. No reference is made to Madison, and, from the declaration and pleas filed, it appears only that direct damages for failure to deliver at Dalton, and injury there resulting, as though that was his contemplated market, is sought. No averment is made that defendant had consigned the stock to Madison over defendant's road, and any other connection therewith, and that, owing to defendant's negligence in carrying the stock over its road to Dalton, delay in reaching Madison was occasioned, and the damages thereby resulted; but the case made in the pleadings is one which makes all evidence of damage by reason of the failure to arrive at Madison in reasonable time, or in any time, wholly irrelevant. It was therefore error in the circuit judge to admit, over defendant's objection, the evidence of plaintiff's witness Henley, that he had a contract for the sale of eighteen of the mules at Madison, and his loss in consequence of failure to reach there in time to fulfil it.

DAMAGES RECOVERABLE—MARKET VALUE—DELAY.

It was also error to allow the evidence given by some witnesses that the actual value of the mules at Madison was $500 less than it was when they left Sweetwater; and the charge of the court that the jury, "if the evidence showed that the mules were consigned to Madison, Georgia, for the market there, and, by reason of the illegal delay on the line of defendant, they were rendered less valuable to the plaintiff at Dalton, to fill contracts at or for the

market at Madison, might give plaintiff damages to the extent of such injuries at Dalton," was clearly erroneous, for the same reason as was also the further charge that it "was competent for the jury to look to the condition of the mule market at Madison, to outstanding contracts for the delivery of mules there, if any are shown, in connection with all other evidence on the subject, in order to say how it is at Dalton, and to ascertain the damages, if any, to defendant at Dalton, at the time of the delivery of said mules." Instead of saying this to the jury, the court should have said, under the pleadings in this case, they could look alone to the market value of the stock at Dalton; and if there had been any delay in its delivery there, occasioned by the negligence and fault of the defendant, they would ascertain its value at the time it would have been delivered, and at the time it was delivered, and depreciation, if there was any, in this comparison would be the measure of damages; and plaintiff would be entitled to recover the difference in the value of the stock at the time it was delivered and its value at the time it should have been delivered under the contract. If it had then appeared that there was no market at Dalton, then such value might have been ascertained upon proof of the market value at other convenient points; but proof of value elsewhere would have been irrelevant, except upon such occasion, to establish value at Dalton; and, even in that view, evidence of defendant's contract at Madison, as admitted, would have been incompetent. The evidence must be confined to the case made in the pleading, and not addressed to the case which might have been made upon the contract and facts, upon a different state of pleading. The commission reported that there was no evidence to sustain the verdict. It is clear that the evidence did not justify a verdict for $500 for the depreciation occasioned by delay or otherwise between Cleveland and Dalton; but as the evidence was not confined to this point, under the rulings of the circuit judge, and as a new trial is to be had, we content ourselves to reverse for errors indicated, without expressing any opinion on the question as to whether there was any evidence offered, or which could have been offered, upon the facts shown, to justify a verdict for any amount. The report of the commission will not be confirmed, as in some other respects it is not satisfactory, but the judgment of the circuit court will be reversed, and the case remanded for a new trial. The defendant in error will pay the cost of this court.

Measure of Damages where Goods are Delayed in Transit.—See Lindley v. Richmond, etc., R. Co., 9 Am. & Eng. R. R. Cas. 31; Peterson's Case, 18 Ib. 578; Houston, etc., R. Co. v. Jackson, 21 Ib. 126; Texas Pac. R. Co. v. Nicholson, 21 Ib. 133; St. Louis, etc., R. Co. v. Mudford, and note, 21 Ib. 139–142; Houston, etc., R. Co. v. Smith, 22 Ib. 421.

BIRD

v.

GEORGIA R.

(72 *Georgia*, 655.)

A carrier who receives goods to be carried over its own lines and over successive lines of transportation connected therewith, to be delivered at some distant point, acts as the forwarding agent of the owner in giving instructions as to the transportation of the goods; and in case of a mistake by the first carrier in directing the goods, the last carrier will have a lien upon them for the freight earned by it, unless the owner gave notice of the route and the lines of road over which his goods were to be transported.

If goods were shipped over a connecting line of roads, and there were two routes by which the terminal point could be reached, one of which was designated by direction of the consignee, who was also the owner, but they were, in fact, sent to the terminal point by the other route, if the road so wrongly receiving them knew of the direction as to their shipment when it received them, its transportation of the goods would be voluntary; it would have no right to charge freight for transportation, would have no lien on the goods for such charges, and could not retain possession for the purpose of collecting them.

A demand by the consignee and refusal by the defendant to deliver the goods would be a conversion for which trover would lie; and the county where such demand and refusal occurred would be the proper venue of the action.

Whether the carrier receiving and transporting the goods had knowledge of the direction that they should be transported by a different line, was a question of fact for the jury; and the marks on the goods, with other circumstances, could be considered in determining that question.

Before Judge ESTES. Clarke Superior Court.
George D. Thomas for plaintiff in error.
J. B. Cumming for defendant.

BLANDFORD, J.—The plaintiff in error brought his action of trover against defendant. Upon the trial of the case, he showed that he shipped the goods sued for from Cincinnati and other points to Athens, Georgia. Bills of lading were taken by plaintiff, which specified that the goods were to be shipped from Atlanta to Athens via Richmond & Danville R.; on the packages of goods were marked, "John Bird, Athens, Georgia, via R. & D. R. R." The defendant company received the goods at Atlanta from the Western & Atlantic R., and carried them to Athens. Plaintiff tendered the freight charges to Atlanta, and demanded that the goods be delivered to him. This demand was refused by defendant, unless plaintiff would also pay the freight charges from Atlanta to Athens, and asserted its right to retain the goods for its lien for such freight charges. It was also shown that there was a way-bill accompanying these goods, which indi- FACTS.

cated that the goods were to be transported over defendant's road. The court, among other things, charged the jury that "a deviation from the route over which goods are ordered to be shipped gives no rights of action, unless such deviation is accompanied with loss or damage." "A deviation by a railroad company from the route selected, and for which instructions are given by the shipper, will not amount in law to a conversion, unless such deviation is accompanied with loss or damage." "When goods are shipped over a specified route, which includes several connecting railroads, and one of those intermediate roads diverts the goods from such specified route, and sends them to their destination without loss or damage, the last road (although not in the specified route), will have a lien for its reasonable freight charges, and may hold the goods until such charges are paid, unless actual notice be given to such road by the shipper not to receive or transport the goods."

The jury, under these instructions, found for the defendant; whereupon plaintiff moved the court for a new trial, alleging as error the charges aforesaid. The court refused the motion, and this writ of error is prosecuted to reverse the rulings of the court below.

1, 2, 3, 4. A carrier who receives goods to be carried over his own lines, and over successive lines of transportation connected with it, to be delivered at some distant point, acts as the forwarding agent of the owner in giving instructions as to the transportation of the goods; and in case of a mistake by the first carrier in directing the goods, the last carrier will have a lien upon the goods for the freight earned by it, unless the owner gave notice of the route and the lines of road over which his goods were to be transported. 6 Allen, 246. If the plaintiff's goods were to be shipped over the Richmond & Danville R. from Atlanta to Athens by the direction of the plaintiff, and if such direction was known to the defendant when it received the goods at Atlanta, the transportation of the goods, under these circumstances, by defendant to Athens would be voluntary, and for which it would have no right to charge freight for their transportation, and would have no lien on the goods for such freight charges, and consequently could not retain the goods in its possession for such charges. A demand by the plaintiff and refusal by defendant to deliver the goods would be a conversion for which trover would lie, and the county where such demand and refusal occurred would be the proper venue of the action.

SHIPMENT OVER DIFFERENT ROUTE FROM THAT DIRECTED BY OWNER.

The main question in this case is, did the defendant know, when it received the plaintiff's goods from the Western & Atlantic R., that the same were to be transported over the Richmond & Danville R., or were the facts sufficient to charge the defendant with such knowledge? If so, then the defendant would have no right to demand pay for such transpor-

DEFENDANT NO RIGHT TO PAY FOR TRANSPORTATION.

tation. The question whether defendant had such knowledge was a question for the determination of a jury, under the facts, and it would be proper for them to take into consideration the marks on the several packages of goods; did these marks indicate that the goods were to go by way of the Richmond & Danville R.? This, together with other facts submitted in evidence, should be consieered, and they should find whether defendant knew that plaintiff had directed his goods shipped over another line of road than defendant's; and if such should prove to be the fact, the defendant would be liable in this action.

This question has not been fairly submitted for the considerationof the jury in the several charges of the court complained of.

Cases cited by plaintiff in error: Code, §719 (q); 68 Ga. 623; 26 Id. 619; 14 Id. 283; 48 Id. 85; Code, §2077; 25 Ga. 707; Hutch. on Carriers, §§447, 491, 468, 443, 310; Lawson on Carriers, §11; 8 Gray, 262; 9 Id. 231; 5 Cushing, 137; 1 Doug. 1.

For defendant in error: Hutch. on Car. 478; 6 Allen, 246; 105 Mass. 267; 8 Gray, 262, 266; 100 Mass. 515, 262; Sedgewick on Damages, 97.

Let the judgment refusing the new trial be reversed.

South and North Alabama R. Co.

v.

Wilson.

(78 *Alabama* 587.)

When compensation is demanded of a railroad company for damages to goods transported, and the demand is refused on the ground that the goods were carried at the "owner's risk;" this is a circumstance from which the jury may infer a waiver of all other grounds of defence, and an admission that the goods were damaged while in possession of the carrier.

When loss or damage to goods occurs while they are in the custody of the carrier, though carried at "owner's risk," the carrier must make at least a *prima facie* showing that it was not caused by his negligence.

Under a complaint in the form prescribed for the non-delivery of goods by a carrier (Code, p. 708, Form No. 18), a recovery cannot be had on proof that they were delivered in a damaged condition.

Appeal from the Circuit Court of Chilton.

Tried before the Hon. James E. Cobb.

This action was brought by H. A. Wilson against the appellant, a domestic corporation, claiming $85 "as damages for certain goods," which were particularly described, "received by the South

& North Alabama R. Co. as a common carrier, to be delivered to the plaintiff at Lomax, in the county of Chilton, State of Alabama, for a reward; which the South & North Alabama R. Co. as aforesaid failed to do." On all the evidence adduced, which is set out in the bill of exceptions, and the substance of which is stated in the opinion of this court, the defendant asked the court to instruct the jury "that they must find for the defendant, if they believed the evidence;" and the refusal of this charge is now assigned as error.

Thos. G. Jones and *J. M. Falkner* for appellant.
W. A. Collier, contra.

STONE, C. J.—Wilson, the appellee, shipped furniture by the appellant corporation from Montgomery, to be delivered at Lomax, a flag station on the railroad. There was proof that the furniture was well packed and in a sound condition when it was placed on a dray to be delivered on the railroad; that on the next day, a few or several hours after the unloading, as testified by the several witnesses, the furniture was lying on the platform used for such purpose at Lomax, and was damaged. Claim of compensation for the injury was made on the railroad, and the testimony tends to show that the claim was referred to the general freight agent, who declined to pay, giving as the only expressed reason that the furniture was shipped at the "owner's risk." No bill of lading was produced, nor was it shown whether any was given. The foregoing is the substance of all the testimony, except that which relates to the extent of the injury. The single question presented for our consideration springs out of the refusal of the court to charge the jury that if they believed the evidence, they must find for the defendant.

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If there was a correspondence between the allegations and the proof there is one hypothesis—only one—on which the charge asked could have been properly given. That hypothesis is that there was no testimony, either of fact or circumstance, upon which the jury could have found that the furniture was injured through the railroad's want of care. 1 Brick. Dig. 335; Hall *v.* Posey, at present term. Is that the condition of this case, as shown by the record? We think not. When demand was made on the railroad for compensation for injury done to the furniture, the refusal to pay was placed, not on general grounds, nor on a denial that the furniture was injured while in transit on the railroad, but on the specific ground that the furniture had been shipped at the owner's risk. Placing the refusal on this ground was at least a circumstance the jury might consider in determining whether all other grounds were waived, or did not exist. Such is the rule in analogous questions. Then, if the jury inferred from the character of the refusal that the corporation did

SHIPMENT AT OWNER'S RISK—COMPANY MUST SHOW FREEDOM FROM NEGLIGENCE.

not controvert the breaking while the furniture was in its custody, but claimed exemption from liability by force of the special agreement that the shipment was at the owner's risk; this, without more, did not exempt the railroad from liability. In Steele *v.* Townsend, 37 Ala. 247, 253, this court, speaking of this question, said: "The correct view is that the loss is not brought within the exception, unless it appears to have occurred without negligence on the part of the carrier; and as it is for the carrier to bring himself within the exception, he must make at least a *prima facie* showing that the injury was not caused by his neglect." S. & N. Ala. R. Co. *v.* Henlein, 52 Ala. 606. No testimony was offered to exculpate the railroad from neglect. Other reasons might be given in support of the position taken above.

There is, however, another view of this question. The *gravamen* of the complaint is the non-delivery of the furniture at the depot of its destination. Its language, after describing the furniture, is: "Received by the South and North Ala. R. Co. as a common carrier, to be delivered to the plaintiff at Lomax, in the county of Chilton, State of Alabama, for a reward; which the South and North Ala. R. Co. as aforesaid failed to do." This is a substantial copy of form No. 13, p. 703 of the Code of 1876, and is appropriate and sufficient when the complaint is that the goods were not delivered. In such case, the *gravamen* is the breach of the contract to deliver. In the present case the goods were delivered, and the complaint is that they were broken and damaged in transit by the negligence of the carrier. This was no breach of the contract to deliver, but may have been a breach of the duty or agreement, express or implied, to deliver in good order, or such order as the contract of affreightment required. The averment shows a non-feasance, while the proof tends to show a malfeasance. There was a material variance between the allegations and proof—such as required an amendment of the complaint to justify a recovery. 1 Greenl. Ev. §§ 63, 64, 66; Hutch. on Car. § 750; Fairchild *v.* Slocum, 19 Wend. 329; Hall *v.* Penn. Co., 90 Ind. 459.

BREACH OF CONTRACT TO DELIVER.

The evidence did not sustain the allegations, and for this reason the charge asked should have been given.

Reversed and remanded.

LOUISVILLE AND NASHVILLE R. CO.

v.

MEYER.

(78 *Alabama*, 597.)

A demand and refusal being only a method of proving a default, and the law not requiring a useless thing, an action may be maintained against a carrier for the loss of goods, without proof of a demand at the place of destination, when the evidence shows that the goods never reached that place.

When a common carrier receives goods consigned to a place beyond the terminus of his own line, and does not limit his liability by express contract, he assumes the duty and obligation to deliver them safely at the place of destination, and is liable for a loss occurring on any part of the route.

The carrier may, by express contract, limit his liability to losses or damage occurring on his own route; but such limitation must he shown to have been brought to the notice of the consigner, and to have been accepted by or acquiesced in by him.

If the consignor, contemporaneously with the delivery of the goods to the carrier, receives a bill of lading limiting the liability of the carrier to losses occurring on his own route, "possibly he would be conclusively presumed to have read it, and to have acquiesced in it;" but this principle does not apply, where it is shown that the carrier, receiving the freight for the entire route, made out a bill of lading, which, being incomplete as to the amount of the charges, was not delivered to the consignor at the time, but was afterwards forwarded to him by mail at the place of destination.

APPEAL from the Circuit Court of Cullman.

Tried before the Hon. James Aiken.

This action was brought by Henry Meyer, against the appellant corporation, as a common carrier, to recover damages for the loss of certain goods delivered by him to the defendant, at Cullman, to be carried and delivered to him at Bluffton, in Indiana. On the evidence adduced, the defendant requested seven charges in writing to the jury, each of which the court refused to give. The defendant duly excepted to the refusal of these charges, and the several assignments of error are based on their refusal. The opinion states the material facts.

Geo. H. Parker for appellant.

H. L. Watlington, contra.

STONE, C. J.—The appellant railroad company received at one of its depots, a package of freight, consigned to the appellee at FACTS. Bluffton in the State of Indiana, a point beyond the terminus of its own line of railroad. It received prepaid freight for the whole distance, and executed a bill of lading, binding itself

to deliver the freight at the place of consignment. The consignee brought this action, and, averring that the goods were not delivered, sued to recover their value. There were verdict and judgment for the plaintiff.

The first charge asked by the defendant, and refused by the court, asserts the proposition, that unless the plaintiff demanded the goods at the point of destination—Bluffton, Indiana —from the carrier at that point, then there can be no recovery. This charge was rightly refused. The law does not require a useless thing; and there is testimony tending to prove that the goods were lost before they reached their destination. If that be true, a demand would have been fruitless, and need not have been made. Demand and refusal are but a method of proving a default; and that default may be proved by other methods, as well as by demand and refusal.

DEMAND NOT NECESSARY.

The rule is settled in this State, that "where a carrier receives goods directed [consigned] to a place beyond the terminus of his own route, without limiting his liability by express agreement, by the acceptance of the goods he assumes the duty and incurs the obligation to deliver them safely at the point of destination." M. &. G. R. Co. *v.* Copeland, 63 Ala. 219. And this is the declared rule in a majority of the best considered cases. Ill. Cent. R. Co. *v.* Copeland, 24 Ill. 332; Ill. Cent. R. Co. *v.* Johnson, 34 Ill. 389; So. Express Co. *v.* Shea, 38 Ga. 519; Little *v.* Semple, 8 Mo. 99; Hill Man Co. *v.* B. & L. R. Co., 104 Mass. 122; Railroad Co. *v.* Pratt, 22 Wall. 123; Weed *v.* S. & S. R. Co., 19 Wend. 534; Burtis *v.* B. & S. L. R. Co., 24 N. Y. 269; Quinby *v.* Vanderbilt, 17 N. Y. 315; Lock Co. *v.* R. Co., 48 N. H. 339; Noyes *v.* R. Co., 27 Verm. 110; Perkins *v.* R. Co., 47 Mo. 573; Carter *v.* Peck, 4 Sneed, 203; Mosher *v.* So. Express Co., 38 Ga. 37.

EXTRA-TERMINAL LIABILITY OF CARRIERS.

We do not understand the rule stated above to be controverted in this case; but it is contended for appellant, that there is an express exception from the operation of the rule, embodied in the bill of lading given in this case, and that the railroad company has brought itself within the exception. The doctrine may be regarded as settled, that a common carrier may by contract lessen the stern, if not severe liability, which rested upon him by the rules of the common law. The right, however, must not be so exercised as to be unreasonable in its demands, nor to excuse want of proper care and diligence in the carrier and the agencies he employs. No man can, in such service, bargain for immunity from the effects of a want of that degree of diligence the nature of the service demands. And to render such limitation of liability available as an excuse or defence, it must be shown to have been accepted, or acquiesced in by the consignor. Courts scrutinize such asserted exceptions with a watchful eye.

RIGHT OF CARRIER TO LIMIT LIABILITY.

Steele *v.* Townsend, 37 Ala. 247; S. & N. R. Co. *v.* Henlein, 52 Ala. 606; R. Co. *v.* Man. Co, 16 Wall. 318; R. Co. *v.* Lockwood, 17 Wall. 357; Chouteaux *v.* Leech, 18 Penn. St. 224; F. & Mech. Bank *v.* C. Transp. Co., 56 Amer. Dec. 68, and note; Note to Cole *v.* Goodwin, 32 Amer. Dec. 495 to 507; Hutch. on Car. §§ 240 *et seq.;* Ang. on Car. §§ 220 *et seq.*

ADDITIONAL FACTS.

The facts of this case are substantially as follows: Meyer, the consignor, delivered the goods to the freight agent of the defendant company at Cullman, one of its shipping stations. They were directed, or consigned, to Bluffton in Indiana, and Meyer proposed to prepay freight for the entire route. The agent was not able to tell him the rate, but accepted as a deposit a sufficient sum of money to pay the freight when the rate should be ascertained. He gave him no bill of lading, but filled up one of the printed forms, making it complete except the freight rate; but it was not then delivered to Meyer. The freight agent testified, that "the bill of lading was open before plaintiff at the time" [the time it was filled up], "and he could have known the contents, if he had desired;" "could not say plaintiff read the paper." Its contents were not explained to him. On the next day, the agent, having learned the rate, inserted it in the bill of lading, which he forwarded, together with the surplus of money to Meyer, at Bluffton, Indiana. The testimony tended to show the box of goods was safely transported to a point beyond the defendant railroad's terminus, and that, if lost, it must have been after it had left defendant's personal custody.

One clause in the bill of lading reads as follows: "It is further stipulated and agreed, that in case of any loss, detriment, or damage done to, or sustained by any of the property herein receipted for, during such transportation, whereby any legal liability or responsibility shall or may be incurred, that company alone shall be held answerable therefor, in whose actual custody the same may be at the time of the happening of such loss, detriment, or damage."

CONTENTS OF BILL OF LADING —WHEN CONSIGNOR IS CHARGED WITH NOTICE.

It is contended that Meyer could and should have read the bill of lading when it was being filled up, and that therefore he must be charged with a knowledge of its terms, and held to have acquiesced in them. On this theory, several charges were asked and refused. We think this position untenable. Possibly, if contemporaneously with the delivery of the goods to the railroad he had received the bill of lading containing such stipulation, he would be conclusively presumed to have read it, and to have acquiesced in it. Goetter *v.* Pickett, 61 Ala. 387; Dawson *v.* Burrus, 73 Ala. 111. And this would have been no hardship, for he would then have had it in his power to reject the terms. Failing to read the contract he was accepting, might be fairly interpreted as an expression of full confidence, and an agreement to accept the terms they would offer. That is not this

case. The railroad company, through its agent, agreed to accept, and did accept the freight, knowing it was consigned to a point beyond its terminus. It agreed to accept, and did accept, payment of freight charges for the entire route. These, without more, bound the railroad company, as a common carrier, to deliver the freight at the point of destination. That liability could have been limited by special contract—stipulated terms acquiesced in by the shipper. There is nothing in this record to show that Meyer was informed of any proposed limitation of the carrier's accustomed liability, nor is anything shown which cast on him the duty of informing himself. The cnarges asked were properly refused.

Affirmed.

Liability of Carrier for Goods Consigned beyond Terminus of Route.—See Gulf, etc., R. Co. *v.* Golding, and note, 23 Am. & Eng. R. R. Cas. 732.

Lockhart

v.

The Western and Atlantic R.

(73 *Georgia* 472.)

Suit for the destruction of an oil painting by a railroad, over which it was shipped, was brought by the sister of the owner and consignee, and on the trial she testified that her brother had suffered her to keep the picture until called for, and, if he never did so, it was to be her property, it being an heirloom in the family and prized by her on that account, and that she was responsible for its delivery to him.

***Held*, that the plaintiff had no property, general or special, in the picture, but was a mere borrower, and could not sue in her own name; but an action for the destruction of the picture should have been brought in the name of the owner.**

(*a*.) A borrower acquires no property in the thing loaned, but only the right to possess and use it; and for any interference with that right he may maintain an action.

(*b*.) In all cases of bailment, where the property is in possession of the bailee, and a trespass is committed during the continuance of the bailment, this gives the bailee a right of action for the interference with his special property, and a concurrent right to the owner or bailor, for the interference with his general property.

(*c*.) A carrier cannot dispute the title of the party delivering goods for transportation, by setting up title in himself or in a third person, which is not being enforced against him; but such is not the case here.

Before Judge Hammond, Fulton Superior Court.

Robert B. Trippe for plaintiff in error.

Julius L. Brown for defendant.

HALL, J.—The plaintiff brought suit in a justice's court against the defendant for one hundred dollars "damages to personal property." The cause of action attached to the justice's summons was for injury and damage done in destroying an oil painting representing Tallulah Falls, and for injury to the frame of said picture, said package having been received for transportation as freight by the Western and Atlantic R. at Kingston, Ga., to be transported to Atlanta, Ga., $100.00. The justice awarded judgment to the plaintiff for the amount sued for, and from this judgment an appeal was taken to the superior court of Fulton county. On the appeal trial, a freight receipt given by the agent at Rome, Ga., to Daily for the picture in question, to be shipped from that point to Atlanta, and consigned to R. G. Lockhart, was put in evidence by the plaintiff. It was shown that the package containing the picture was in good order when delivered at Kingston to the defendant; when it reached Atlanta, the painting and frame were both demolished to such an extent as to be utterly worthless; the value was proved. The plaintiff proved that the picture belonged to her brother, who had suffered her to keep it until he called for it, and if he never did so, it was to be her property. She further testified that she was responsible for its delivery to him. At the close of the testimony, a non-suit was moved and granted by the court, and to this judgment the plaintiff excepted.

FACTS.

The picture was an heirloom in the plaintiff's family, and was prized by her on that account; she does not appear to have derived any revenue by exhibiting it; it was entrusted to her for safe keeping and for her personal pleasure and for the gratification it afforded herself and friends; she had no property, either general or special, in it, and in her own name could maintain no action for its loss or destruction. The action should have been brought in the name of the owner. The plaintiff was only a borrower (29 Ga. 356), and acquired no title in the picture loaned; her right was to possess and use it, and for any interference with that right she might maintain an action. Code, § 2129. In all cases of bailment, where the property is in possession of the bailee, and a trespass is committed during the continuance of the bailment, this gives the bailee a right of action for interference with his special property, and a concurrent right to the owner or bailor for the interference with his general property. Code, §§ 3030, 2091, 2141.

PLAINTIFF COULD MAINTAIN NO ACTION FOR DESTRUCTION OF PROPERTY.

It is admitted that a carrier cannot dispute the title of the party delivering goods for transportation by setting up title in himself, or a title in third persons, which is not being enforced against him. Code, § 2476 and citations. But that is not this case; he sets up no adverse claim; does not refuse to deliver the property to the consignee. The plaintiff herself shows that she has no interest in, or title to, the property which has been damaged, and for which she

asks to recover compensation. The non-suit was properly awarded, because it appeared from her own evidence that she had no right to maintain the suit.

Judgment affirmed.

Liability of Common Carrier to Borrower for Damage to Borrowed Goods.—A borrower has an interest in the custody and safety of the property borrowed, because he is answerable for it to the lender. Rooth v. Wilson, 1 B. and A. 59.

And this interest of possession entitles him to a right of action against third parties for the defence of the goods. Burton v. Hughes, 2 Bing. R. 173; Sutton v. Buck, 2 Launt R. 302; Poole v. Symonds, 2 N. H. R. 289.

Possession until the contrary appears is evidence of title which must prevail. A naked possession of chattels where nothing appears to qualify its character is enough to establish the right of action in the plaintiff. Duncan v. Spear, 11 Wend. 54.

Fort Worth and D. C. R. Co.

v.

Riley.

(Advance Case, Texas Court of Appeals. June 5, 1886.)

A mere permission by the agent of a railroad company to an owner of cattle to place the cattle in the company's yards, where no bill of lading is given, does not render the company liable for damages caused by the escape of the cattle.

Appeal from Montague county.

Willson, J.—On February 10, 1885, the appellee, plaintiff below, commenced his action against appellant in the county court of Montague county, alleging in his petition that on Facts. the thirty-first day of December, 1883, plaintiff contracted with defendant for the shipment and safe transportation and delivery of 90 head of beef steers, from the town of Bowie, Texas, to the National stock-yards, in St. Louis, Missouri; that in pursuance of said contract he delivered the 90 head of cattle to defendant; that said steers were placed within the stock-pens of defendant at Bowie, Texas, on said day; that the defendant on the day aforesaid, accepted said steers for shipment, but at said time failed to deliver to plaintiff a bill of lading therefor, but promised and agreed with plaintiff to execute and deliver to him a bill of lading on the day following; that after said steers were delivered to and accepted by defendant, and on the same day, viz., the thirty-first day of

November, 1883, at 9 o'clock P. M., the defendant, through the carelessness and negligence of its agents and employees at Bowie, Texas, permitted 21 head of said beef steers to escape from said stock-pens aforesaid, and run entirely off, and out of the reach of plaintiff; that defendant had failed, refused, and neglected to keep their said stock-pens in repair; and that, by reason of its refusal to keep the same in repair, and its failure and refusal to properly guard and protect the same, the said cattle were permitted to escape therefrom. He then alleges that two head, which he could not find, were worth $64; that the costs of collecting the 19 head recovered was $5 per head, $95; that the 19 head depreciated in value $7 per head, $133—making $292 in all. He recovered a judgment for $200.50, and costs.

The evidence fails to show that the cattle were delivered to and received by appellant. They were placed in appellant's stock-pen by permission of its agent, but, at the time they escaped from the pen, had not been received for shipment, and appellant had in no way become responsible therefor. There is no evidence whatever that the cattle escaped because of any negligence on the part of appellant, its agents, or employees, even had said cattle been received for shipment. At the time of the escape of the cattle they were in the possession and charge of appellee, and must have escaped, so far as the evidence shows, because of his own negligence.

COMPANY NOT LIABLE FOR LOSS OF CATTLE.

The verdict and judgment are not supported by, but are against, the evidence, and the judgment is reversed, and cause remanded.

Other errors are assigned, some of which assignments are well taken, and would require a reversal of the judgment, but we do not take time to discuss them, as they may not occur on another trial.

The judgment is reversed and the cause is remanded.

What Constitutes Delivery to Carrier.—See, generally, Pittsburgh, etc., R. Co. *v.* Barrett, 3 Am. & Eng. R. R. Cas. 256; Marquette, etc., R. Co. *v.* Kirkwood, 9 Ib. 85; Mo. Pac. R. Co. *v.* Douglass, 16 Ib. 98; Montgomery, etc., R. Co. *v.* Kolb, 18 Ib. 512; Little Rock, etc., R. Co. *v.* Hunter, 18 Ib. 527; Quarrier *v.* Baltimore, etc., R. Co., 18 Ib. 535.

KIRKPATRICK *et al.*

v.

KANSAS CITY, ST. JOSEPH AND COUNCIL BLUFFS R. CO.

(86 *Missouri*, 341.)

The consignees of a car-load of wheat screenings, shipped over a company's railroad, but which was destroyed before reaching its destination, may maintain an action against the railroad company for the recovery of damages for such destruction.

Where the consignee of goods shipped upon a railroad pays the draft drawn on him by the shipper and receives the bill of lading to which the draft is attached, and subsequently purchases the goods from the owner, he thereby becomes the real party in interest under the Code. R. S. sec. 3462. And it makes no difference that the goods were destroyed before the absolute sale, as the property of the owner in them still continued and was the subject of transfer, and the transferee could maintain action for damages for their destruction on the ground of such transfer.

APPEAL from Jackson Circuit Court—Hon. T. A. Gill, Judge. Affirmed.

Plaintiffs were merchants residing and doing business in Kansas City. H. B. Slaughter, a grain dealer, residing and doing business there, contracted for two car-loads of wheat screenings with H. C. Goodell, of Winthrop (or East Atchison), Mo. On the twenty-fifth of March, Slaughter went to Winthrop, examined the car-load of screenings in controversy, accepted it, took a sample of it, and instructed Mr. Goodell to bill the car to plaintiffs at Kansas City, and draw on them for the price, attaching draft to bill of lading, as he might not be at home when it arrived there, and he had arranged with plaintiffs to take care of the draft if he was away from town, which Goodell accordingly did. Plaintiffs paid the draft, amounting to $215.05, on presentation, and charged the amount to Slaughter on their books. On the twenty-ninth of March the screenings were totally destroyed by the wrecking of the car while in course of transportation over the defendant's line, at a point about four miles below Winthrop.

Some time between two and three weeks after the twenty-fifth day of March, plaintiffs purchased the screenings of Slaughter, by the sample he had, for eighty-five cents a bushel, and it was agreed between them that sixty pounds should be considered a bushel; that Slaughter should deliver the screenings to the State Line Elevator, at Kansas City, the screenings to be there weighed and paid for by the elevator weights. Having learned that the screenings were destroyed, the plaintiffs and Slaughter, on the third day of May, agreed to adjust the matter between them on the basis of

Goodell's Atchison weights, which was accordingly done, and the price of the screenings at eighty-five cents per bushel, Atchison weights, was credited to Slaughter on plaintiffs' books. Plaintiffs demanded of defendant the value of the screenings at eighty-five cents a bushel, which being refused, they instituted this action in the Jackson Circuit Court.

On behalf of the plaintiffs, the court, at their request, gave to the jury the following instructions:

"1. If the jury believe from the evidence that the defendant did receive from H. C. Goodell the grain described in the petition, the property of H. B. Slaughter, and did execute the contract read in evidence, the defendant thereby agreed to safely convey and deliver said goods to Kirkpatrick & Christopher, at Kansas City, Missouri, and if the jury further believe from the evidence that said Slaughter afterwards sold and transferred said grain and said contract to plaintiffs, and that defendant failed to deliver said goods to said Kirkpatrick & Christopher, at Kansas City, Missouri, that they must find for the plaintiffs."

"2. If the jury find for the plaintiffs, they are instructed that the measure of damages to be allowed the plaintiffs is the value of the grain at Kansas City, at the time the grain should have arrived, with interest at six per cent from said time, after deducting freight and other expenses of transportation."

The court, on its own motion, instructed the jury as follows:

"That, in order to constitute a valid sale and delivery of the screenings by Slaughter to plaintiffs, Slaughter must have done everything which, by the terms of the bargain, was incumbent on him to do; he must have intended to part with his possession of the screenings, and must have actually parted with the possession thereof, and the plaintiff must have received said screenings with the intention and for the purpose of holding the same as owner. But the court instructs the jury that a delivery of the bill of lading read in evidence 'to' the plaintiffs, if, in fact, there was such a delivery, constitutes a sufficient delivery of the screenings to pass title thereto."

Strong & Mosman for appellant.

Bryant & Holmes for respondents.

SHERWOOD, J.—Action by plaintiffs who were consignees of a car-load of wheat screenings shipped on defendant's road, but destroyed before reaching the point of destination. The controlling question in this case is the right of plaintiffs to maintain this action. On this point we entertain no doubt. 2 Rover on Railroads, 1330, sec. 5; Ib. 1332, sec. 5; 1328, sec. 2, and cases cited. Moreover, the plaintiffs paid the draft drawn on them, and received the bill of lading, to which the bill was attached, and subsequently purchased the wheat from the owner, Slaughter. 2 Rorer on Rail-

roads, 1318, sec. 2. They thus became the real parties in interest under the Code, sec. 3462. The fact that the screenings were destroyed prior to their absolute sale to plaintiffs does not affect the proper conclusion to be reached. The property of Slaughter in the screenings still continued, and was the subject of transfer to plaintiffs, and they could maintain this action on the ground of transfer if no other.

The instructions, given at the instance of plaintiffs, and of the court's own notion, placed the matter before the jury on the theory of the law as above announced, and discovering no substantial error in the record (R. S. secs. 3569, 3775), we affirm the judgment. All concur.

When Consignee has Right of Action for Loss of Goods.—See Waterman *v.* Chicago, etc., R. Co. 18 Am. & Eng. R. R. Cas. 486; South & N. Ala. R. Co. *v.* Wood, 634; Denver, etc., R. Co. *v.* Frame, 18 Ib. 637; Penna., etc., R. Co. *v.* Poor, 23 Ib. 711.

MYERS *et al.*

v.

WABASH, ST. LOUIS AND PACIFIC R. Co.

(*Advance Case, Missouri. December* 6, 1886.)

The defendant railroad company entered into a special contract with plaintiffs to transport a flock of sheep to a certain point, there to be transferred to another railroad for transportation to their ultimate destination. Under the terms of the contract plaintiffs were to take charge of and care for the sheep while in transit, and were charged with the duty of unloading them for the purposes of the transfer, and with all the risks incident thereto. They were not prevented from performance of this duty by any act or refusal of defendant to act. *Held*, that defendant cannot be held liable for not caring for the stock after they were unloaded; that such a contract cannot be so construed as to cast such duty upon the defendant.

APPEAL from a judgment of the Circuit Court of Scotland County rendered against defendant to recover damages for negligent delay and failure to deliver certain sheep shipped over defendant's railroad. Reversed.

The facts are stated in the opinion.

George S. Grover and *W. H. Blodgett* for appellant.

Smoot & Pettingill for respondents.

NORTON, J.—This is an action to recover damages for loss of sheep occasioned, as the petition alleges, by the negligence of defendant. Plaintiff obtained judgment for $187.50, FACTS. from which defendant has appealed, and among others assigns as error the refusal of the court to sustain a demurrer to the evidence. It appears from the record before us that plaintiff shipped

under a special contract with defendant, 1300 head of sheep from Memphis, in this State, to Moberly.

By said contract defendant was only to transport said sheep to Moberly. A reduced rate of freight was given, and plaintiff and three men were transported on the train to take care of the sheep. In consideration of the reduced rate plaintiffs agreed and undertook to load and unload the sheep at their own risk and expense, and also to assume all risk of injury to the sheep from crowding upon each other, and of all other injuries from any cause.

It appears that the sheep were loaded on the night of December 16, 1882, at Memphis, and left there the next morning, and arrived at Moberly on the night of the 17th, about eleven o'clock, the weather being cold. The ultimate destination of the sheep was Texas, and plaintiffs expected to ship the sheep from Moberly to Texas over a line of road controlled by the Missouri Pacific R. The defendant had two stock-pens at Moberly, with a capacity to hold about 150 head of sheep. The evidence shows that at Moberly there was a transfer track where cars were placed by defendant company and the Missouri Pacific Co., to facilitate the transfer from one road to the other, and that the stock-pens of the Missouri Pacific R. were situated on its own line one mile and a half from the pens of defendant and this transfer track.

On the arrival of the cars containing the sheep at Moberly, they were placed on this transfer track, and one of the plaintiffs, who had previously gone to Moberly to arrange for the transfer, requested defendant's yard-master to haul the sheep over on the Missouri Pacific track to the stock-pens of that company. This the yard-master declined to do, on the ground that he had no right to use the track of the Missouri Pacific Co. without its consent and order authorizing him so to do; at the same time indicating that he would comply with the request if plaintiffs would procure the consent and order of the company. The evidence shows that plaintiffs made an ineffectual attempt to procure such consent, whereupon the yard-master proposed to haul the cars from the transfer track to the pens of defendant in order that the stock might be unloaded, that being the place where defendant had provided facilities for unloading stock. This offer the plaintiffs declined, unless defendant would furnish hands to herd the stock after they were unloaded, which defendant refused to do; and the sheep remained in the cars till seven or eight o'clock the next morning, when plaintiffs unloaded them at the stock-pens of defendant, 75 of them being found dead, their death having been occasioned, as the evidence tended to show, because of their remaining in the cars through the night. It is clear, from the contract of shipment, that plaintiffs were to take charge of and care for the sheep while in transit, and that they were charged with the duty of unloading them

PLAINTIFFS CHARGED WITH CARE OF SHEEP WHILE IN TRANSIT.

at Moberly, and that they assumed all the risks incident thereto. Atchison *v.* R. Co. 80 Mo. 213.

It is equally clear that, upon the arrival of the cars at Moberly, plaintiffs were not hindered nor prevented from performing this duty by any act of defendant, but, on the contrary, defendant was willing either to haul the cars from the transfer track to the yards of the Missouri Pacific Co., if plaintiffs would obtain the consent of that company that defendant might use its track for that purpose; or, failing in this, that it would haul the cars from the transfer track to a place in defendant's yards provided for unloading stock.

The Missouri Pacific Co. refusing to allow its track to be used by defendant, the plaintiffs declined to unload the stock unless defendant would agree to take care of it after it was unloaded, by furnishing hands to herd it. If under the contract it was the duty of plaintiffs to take care of the stock while in transit and unload it, we cannot see how it can be so construed as to cast upon defendant the duty of caring for it after being unloaded. In other words, we cannot so construe the contract under which plaintiffs assumed the duty of caring for the stock while being transported and unloading at the point to which it was to be transported, so as not only to relieve plaintiffs from the duty of receiving and caring for it after being unloaded, but to cast such duty on defendant.

Judgment reversed.

All concur, except RAY, J., absent.

KINNICK *et al.*

v.

CHICAGO, ROCK ISLAND AND PACIFIC R. Co.

(*Advance Case, Iowa. October* 23, 1886.)

The defendant railway company received a car-load of hogs from the plaintiff for shipment. Owing to the wreck of a passenger train, the train on which plaintiffs' hogs were shipped was delayed twelve hours. When the train arrived at its destination a number of the hogs were dead and others badly injured. The defendant offered to prove on the trial that the delay occurred without fault on its part, and that it caused the train to be sent forward as soon as possible, but the evidence was excluded. The defendant claimed that the car was overloaded, and that the injury was caused by such overloading. *Held,*

1. That with reference to the time to be occupied in transporting property the carrier is not held to the extraordinary liability to which he is held for its safety, while it is in his custody, and he may excuse delay in its delivery by proof of misfortune or accident, although not inevitable or produced by act of God.

2. That a common carrier is an insurer of the safety of property in its charge for transportation and is not released from that extraordinary liability for its care by an accident which causes delay, even though it offers an excuse for the delay.

3. That a common carrier of hogs is an insurer against injury caused by their "piling up" while struggling to get near to or away from the car doors; that as their propensity to do this is only while the train is standing, they should be unloaded or given personal attention while the train is delayed.

4. That where there is no misrepresentation on the part of the shipper of live-stock, a common carrier waives all exceptions to defects in loading by accepting stock so loaded for transportation.

APPEAL from Davis district court.

Plaintiff delivered a car-load of hogs to defendant at Drakeville, in this State, for transportation to the Union stock-yards at Chicago. A passenger train on defendant's road was thrown from the track near Ottawa, Illinois, and the obstruction caused by the accident delayed the train on which the plaintiffs' hogs were shipped for about 12 hours. When the train arrived at Chicago, 18 of the hogs were dead, and the others were so injured as to depreciate their value in market. Plaintiffs brought this action to recover the damages occasioned by the injury, alleging that defendant had violated its undertaking as a common carrier to deliver the hogs in Chicago within a reasonable time and in good order; also, that the injury was caused by defendant's negligence. The defendant in its answer denied that the delay in delivering the hogs in Chicago was caused by any negligence on its part, and averred that the train was delayed by unavoidable accident; and averred that the hogs were loaded on the car by plaintiffs; that they had full charge of the work of loading them; that, without defendant's knowledge or consent, they overloaded the car; and that the injury to the hogs while being transported was occasioned by such overloading. The verdict and judgment were for plaintiffs, a motion for a new trial being denied. Defendant appealed.

T. S. Wright, *S. S. Carruthers* and *M. A. Lowe* for appellant.

Payne & Eichelberger for appellees.

REED, J.—1. Defendant offered evidence on the trial to prove that the wreck which obstructed the track, and delayed the train on which the hogs were being transported, occurred without fault on its part, and that it caused the track to be cleared, and sent the train forward, as soon after the accident as practicable; but the evidence was excluded by the court on the plaintiffs' objection. Defendant sought to prove these facts in excuse of the delay in delivering the hogs at Chicago. There was no express undertaking by the defendant to transport the property to its destination within any specified time. The law, however, implies an undertaking by it to deliver it there within a reasonable time. But with reference to the time to be occupied in transport-

DELAY IN TRANSPORTATION AS GROUND FOR RECOVERY.

ing the property the carrier is not held to the extraordinary liability to which he is held for its safety while it is in his custody, and he may excuse delay in its delivery by proof of misfortune or accident, although not inevitable or produced by act of God. Hutch. Carr. § 330; Parsons *v.* Hardy, 14 Wend. 215; so that, if plaintiffs had sought to recover merely on the ground that there was delay in the transportation of the property, there would be no doubt, perhaps, but that defendant would have been entitled to show the facts which the excluded evidence would have tended to prove as an excuse for the delay. But that is not the substance of their complaint.

It is true, they allege that there was delay, but they do not claim that they were damaged by the mere fact of the delay, and the ground upon which they seek to recover is that the property was in bad condition when it reached its destination. It was not disputed that the property was in bad condition when it arrived in Chicago. The burden was therefore on defendant to establish facts which would relieve it from liability because of its bad condition. It was an insurer of the safety of the property while in its charge for transportation, and it was not released from that extraordinary liability for its care by the accident which caused the delay, even though it offered an excuse for the delay. It was bound, notwithstanding the accident, to use the highest degree of care during the delay for the safety of the property. If the removal of the hogs from the car during the time was necessary for their protection from injury, and it was possible to remove them, defendant was bound to do so; and it was bound to give them whatever personal attention was necessary for their protection from injury during the time. But it did not offer to show that it had unloaded them from the cars, or that it was impossible to unload them, or that it was not necessary for their safety to unload them, or that the injury did not occur in consequence of its failure to give them such personal attention as was essential to their safety. But the extent of its offer was to show facts which tended merely to excuse the delay in their transportation. We are very clear that those facts do not afford an excuse for the bad condition of the property at the time of its delivery. The evidence was immaterial, and was rightly excluded.

BAD CONDITION OF HOGS ON ARRIVAL.

2. It was shown on the trial that it is the disposition of hogs, when being transported on cars, to struggle to get near to the doors when the train is standing if the weather is hot, and to crowd away from them if it is cold, and that in doing this they are apt to "pile up," and that when this occurs those beneath are liable to be smothered, unless they receive immediate attention. The court instructed the jury, in effect, that, when the defendant contracted to carry the hogs to their destination, the law imposed upon it the obligation to carry

EXTENT TO WHICH CARRIER IS INSURER OF SAFETY OF PROPERTY.

them in a proper manner, and deliver them in good condition considering the ordinary perils of the road, and that, if it failed to deliver them in such condition, it was responsible in damages for such failure. The instruction holds that defendant was an insurer of the safety of the property, and that its liability extended to all injuries to the property during its transportation, except such as may have resulted from the ordinary perils of the road, such as the usual shrinkage in weight, and such loss from death as would ordinarily occur on the trip with good care and management. Counsel for appellant contend that, as the cause of the injury in question was connected with the natural propensities and characteristics of the property, it was one against which the carrier is not held to be an insurer, and that the instruction is erroneous on that ground.

It was held, in effect, by this court in McCoy *v.* Keokuk & D. M. R. Co., 44 Iowa 424, that, when the cause of damage for which recompense is sought is connected with the character or propensities of the animals undertaken to be carried, the ordinary responsibility of the carrier does not attach. The reasons for the exception to the general rule as to the liability of the carrier, which arises when he undertakes to transport live-stock, are very apparent. There are dangers incident to the transportation of that character of property which are created entirely by the disposition and propensities of the animals, and against which it is often impossible for the carrier to make adequate provision. But the rule of the common law is modified only so far as is rendered necessary by the character of the property in this respect. In every other respect the carrier is held to be an insurer of the property.

In our opinion, the present case is not within the exception to the rule. The injury was caused by the "piling up" of the hogs while struggling to get near to or away from the doors of the car. The propensity, however, was to do this only when the train was standing. Owing to the obstruction of the track, it was kept standing at a station for 12 hours, and, without doubt, it was during that time that the injury occurred. But the danger was not one against which provision could not be made. The injury might have been prevented, either by unloading the hogs or giving them personal attention while in the car. There is no claim that this could not have been done, and we think defendant was bound to do it. As there was nothing shown which tended to take the case out of the general rule, the court did right in instructing that defendant was bound by that rule.

3. Plaintiffs loaded the hogs onto the car without assistance or direction from defendant's agents or employees. Defendant claimed that the car was overloaded, and that the injury was caused by such overloading. The court instructed the jury that, if defendant had knowledge of the number of hogs in the car, and of the condition of the car as to the loading

OVERLOADING CARS.

when it received it, or if it might have known these facts, it could not escape liability for the damage on the ground that the car was overloaded. Exception is taken to this instruction. But we think it is correct. It is not claimed there was any deceit or misrepresentation by plaintiff as to the condition of the car or its loading. Defendant's agent, who made the contract for it, went to the car after the loading was done, and closed and sealed it. There was nothing to prevent him from seeing the manner in which it was loaded. As defendant received the property under these circumstances, and undertook to transport it to its destination, it should be held to have assumed all the liabilities of a common carrier with reference to it.

The judgment of the district court will be affirmed.

Liability of Carrier—Damage Caused by Delay in Carriage of Live-Stock. —See Bills *v.* New York Cent. R. Co., 3 Am. & Eng. R. R. Cas. 318; Philadelphia, etc., R. Co. *v.* Lehman, 6 Ib. 194.

HART

v.

CHICAGO AND NORTHWESTERN R. CO.

(*Advance Case, Iowa. October* 11, 1886.)

The owner of certain property, by agreement with the carrier, undertook to care for it in the course of transportation. The property was destroyed through the act of the owner. Sec. 1308 of the Code Iowa provides that "no contract, receipt, rule, or regulation shall exempt any corporation engaged in transportation of persons or property by railway from liability of common carrier." *Held*,

1. That the carrier was not liable for the loss, although the agreement between the owner and carrier may have been in violation of the above section.

2. That a railroad company is not liable for the injury or destruction of property in the course of transportation when the injury is occasioned by the owner's own act, and whether the act of the owner which caused the injury amounted to negligence or not is immaterial.

3. That the statute of Iowa prohibiting corporations engaged in transporting goods or passengers betweendifferent States from limiting their liability as common carriers by contract is not a regulation of commerce among the States.

APPEAL from Polk Circuit Court.

On the eighteenth day of April, 1883, plaintiff delivered to defendant, at the city of Des Moines, one car-load of property, which the latter undertook to transport to the town of Miller, in Dakota Territory. The property shipped in the car consisted of six horses, two wagons, three sets of harness, a quantity of grain,

a lot of household and kitchen furniture, and personal effects. The contract under which the shipment was made provided that the horses should be loaded, fed, watered, and cared for by the shipper at his own expense, and that one man in charge of them would be passed free on the train that carried the car. It also provided that no liability would be assumed by the defendant on the horses for more than $100 each, unless by special agreement noted on the contract, and no such special agreement was noted on the contract. Plaintiff placed a man in charge of the horses, and he was permitted to and did ride in the car with them. When the train reached Bancroft, in this State, it was discovered that the hay which was carried in the car to be fed to the horses on the trip was on fire. The car was broken open, and the man in charge of the horses was found asleep. The train men and others present attempted to extinguish the fire, but before they succeeded in putting it out the horses were killed and the other property destroyed. This action was brought to recover the value of the property. There was a verdict and judgment for plaintiff, and defendant appealed.

Hubbard, Clark & Dawley and *Whiting J. Clark* for appellant.
Baylies & Baylies and *Hugh Brennan* for appellee.

REED, J.—There was evidence which tended to prove that the fire was communicated to the car from a lantern which the man in charge of the horses had taken into the car. This lantern was furnished by plaintiff, and was taken into the car by his direction. Defendant asked the Circuit Court to instruct the jury that if the fire which destroyed the property was caused by a lighted lantern in the sole use and control of plaintiff's servant, who was in the car in charge of the property, plaintiff could not recover. The court refused to give this instruction, but told the jury that, if the fire was occasioned by the fault or negligence of plaintiff's servant who was in charge of the property, there could be no recovery. The jury might have found from the evidence that the fire was communicated to the hay from the lantern, but that plaintiff's servant was not guilty of any negligence in the matter. The question presented by this assignment of error, then, is whether a common carrier is responsible for the injury or destruction of property while it is in the course of transportation when the injury is caused by some act of the owner, but which is unattended by any negligence on the part of the owner.

FACTS.

The carrier is held to be an insurer of the safety of the property while he has it in possession as a carrier. His undertaking for the care and safety of the property arises by implication of law out of the contract for its carriage. The rule which holds him to be an insurer of the property is founded upon considerations of public policy. The reason of

CARRIER INSURER OF PROPERTY IN HIS POSSESSION.

the rule is that as the carrier ordinarily has the absolute possession and control of the property while it is in course of shipment, he has the most tempting opportunities for embezzlement or for fraudulent collusion with others. If it is lost or destroyed while in his custody, the policy of the law therefore imposes the loss upon him. Cogg *v.* Bernard, 2 Ld. Raym. 909; Forward *v.* Pittard, 1 Durn. & E. 27; Riley *v.* Horne, 5 Bing. 217; Thomas *v.* Railway Co., 10 Metc. 472; Roberts *v.* Turner, 12 Johns 232; Moses *v.* Railway Co., 24 N. H. 71; Rixford *v.* Smith, 52 N. H. 355. His undertaking for the safety of the property, however, is not absolute. He has never been held to be an insurer against injuries occasioned by the act of God, or the public enemy, and there is no reason why he should be; and it is equally clear, we think, that there is no consideration of policy which demands that he should be held to account to the owner for an injury which is occasioned by the owner's own act, and whether the act of the owner by which the injury was caused amounted to negligence is immaterial also. If the immediate cause of the loss was the act of the owner, as between the parties, absolute justice demands that the loss should fall upon him rather than upon the one who has been guilty of no wrong, and it can make no difference that the act cannot be said to be either wrongful or negligent. If, then, the fire which occasioned the loss in question was ignited by the lantern which plaintiff's servant, by his direction, took into the car, and which at the time was in the exclusive control and care of the servant, defendant is not liable, and the question whether the servant handled it carefully or otherwise is not material. This view is abundantly sustained by the authorities. See Hutch. Carr., § 216, and cases cited in the note; also Lawson, Carr., §§ 19, 23.

CARRIER NOT LIABLE FOR INJURY CAUSED BY OWNER'S ACT.

2. Section 1308 of the Code is as follows: "No contract, receipt, rule, or regulation shall exempt any corporation engaged in transporting persons or property by railway from liability of a common carrier, or carrier of passengers, which would exist had no contract, receipt, rule, or regulation been made or entered into." Counsel for plaintiff contend that the provision of the shipping contract by which plaintiff undertook to care for the horses while they were being transported is in violation of this section, and consequently is void. For the purposes of the case this may be conceded, and yet it does not follow that defendant is liable for the loss if it was caused by plaintiff's act. If it should be conceded that defendant was responsible for the proper care of the property while it was being transported, it would follow only that plaintiff was an intermeddler in placing his servant in the car, and in assuming to care for it. If the injury was caused by his act, it is immaterial whether he was proceeding under a valid contract or as an officious volunteer in doing the act.

CONTRACT LIMITING LIABILITY.

3. The evidence tended to prove that two of the horses were worth $150 each, and that two others were worth $125 each, and that the others were worth $100 each. Defendant asked the circuit court to instruct the jury that under the contract defendant's liability for the horses could not exceed $100 per head. The court refused to give this instruction; and ruled that, if plaintiff was entitled to recover, the jury should award him the full value of the property. Whether a common carrier, in the absence of any statute restricting his powers in that respect can, by rule, regulation, or contract limit his liability for the property received by him for carriage, has been the subject of much discussion, and there is great conflict in the decision of the courts on the question. We have no occasion, however, in this case, to enter into that question. No one would question that, in the absence of a contract limiting the amount of his liability, the shipper would be entitled, in case of the destruction or injury of the property under such circumstances as that the carrier was liable for the loss, to recover full compensation for injuries sustained. The statute quoted above prohibits the making of any contract that would exempt him from the liability of a common carrier which would exist if no contract, rule, or regulation existed. If the statute is applicable to a contract in which the undertaking is to transport the property from this State into another State or Territory of the United States, it cannot be doubted, we think, that the provision of the contract in question, by which it was sought to limit the liability of defendant for the horses to an amount less than the actual value of the property is repugnant to its provisions, and consequently invalid.

VALUE OF HORSES—LIMITATION OF LIABILITY.

It is contended, however, that the State has no power to place a restriction of that character upon the carrier who contracts for the transportation of property from this State into another State or Territory. The position is that the restriction, if applicable to a contract of this character, would be a regulation of commerce among the States, a subject which, under the federal constitution, is within the exclusive jurisdiction of the Congress of the United States. In our opinion, however, this position cannot be maintained. The provision is in no just or legal sense a regulation of commerce. It provides no regulation for the transportion of freight upon any of the channels of communication. It leaves the parties free to make such contracts as they may choose to make with reference to the compensation which shall be paid for the services to be rendered. The carrier is left free to demand such compensation for the carriage of the property as is just, considering the responsibility he assumes when he receives it. He is forbidden to make any contract that would exempt him from any of the liabilities which arise by implication from his undertaking to carry the property. But

SAME—RESTRICTION NOT A REGULATION OF INTERSTATE COMMERCE.

no burden is placed upon the property which is the subject of the contract; nor is any rule prescribed for his government respecting it. That it is within the power of the State to prescribe such a limitation upon his power to contract, we have no doubt. The statute was enacted by the State in the exercise of the police power with jurisdiction. The question involved is not different in principle from that decided by the Supreme Court of the United States, in what are known as the Granger Cases. See Munn *v.* State, 94 U. S. 113; Chicago, B. & Q. R. Co. *v.* Iowa, Id. 155; Peik *v.* Chicago & N. W. R. Co., Id. 164.

Liability of Carrier for Injury to Animals Accompanied by Owner.—Railroad companies have a right to limit their liability as common carriers by such contracts as may be specially agreed upon, they still remaining liable for gross negligence or wilful misfeasance. Illinois Central R. Co. *v.* Crabtree, 19 Ill. R. 139.

In Clarke *v.* Rochester, R. 4 Kern. 570, it was held that the fact that the owner of a horse was allowed passage on the same train in which his horse was carried did not prove conclusively, if at all, that he was responsible for the horse's safety during the journey.

In Illinois Central R. *v.* Adams, 42 Ill. 474, hogs were transported by a railroad under a contract which provided that they were to be taken care of by the owner. A loss occurred by neglect of the conductor of the train to cause water to be poured over the hogs when overheated. *Held*, that the conductor was negligent, and that the company were liable.

Where a railway company undertook to transport a lot of cattle for their owner, who was to take charge of them, in a car which proved to be defective, by reason of which the cattle had to be changed to another car, which the owner of the cattle had no opportunity to properly provide with bedding, whereby some of the cattle got down and were injured, it was *held* that the company were liable for the loss sustained. McDaniel *v.* Chicago, etc., R. Co., 24 Ia. 412.

The company were held liable for the death of cattle smothered by being shipped in box-cars. It was decided that the presence of the owner did not relieve the company of the responsibility. Peters *v.* New Orleans, etc., R. Co. 16 La. An. 222.

McGowan

v.

Wilmington and Weldon R. Co.

(*Advance Case, North Carolina.* 1886.)

In an action against a railroad company to recover a statutory penalty for failing to ship a certain lot of rice delivered to it for shipment, it is not error to exclude the question asked of defendant's witness, "Did persons who delivered rice for the plaintiff give any instructions at the time of delivery in regard to the time of shipment?" when the sole question at issue is whether defendant did or did not ship the rice.

When a question objected to, but allowed, elicits nothing material and nothing to the prejudice of the party complaining, this is not a ground for a new trial.

In the absence of a contract between the shipper and the carrier to the contrary, there is an implied agreement on the part of the carrier to ship goods within a reasonable time, which the statute of North Carolina has fixed to be within five days next after the receipt of the goods.

Where the court states to the jury that "Defendant sets up no excuse for a failure to ship, if there was such failure," it is not error; it is merely in effect telling the jury that the defendant had not set up any legal excuse for failing to ship the goods.

Where a bill of lading provides against any liability of the carrier for "wrong carriage or wrong delivery of goods that are marked with the initials, unnumbered or imperfectly marked," and it is not a part of the plaintiff's complaint that the rice was wrongly carried or wrongly delivered, and no defence is set up that the goods were not marked with the proper directions, nor any imperfection in that respect brought to the attention of the plaintiff, but the sole ground of action is that the goods were not shipped at all, the only question at issue is whether the goods were shipped or not.

Where the charter of a railroad company provides that its officers may establish its price, rates of freights and fares in their discretion, not exceeding a maximum rate prescribed, a statute compelling railroad companies to ship over their roads goods delivered to them for shipment within a reasonable time, which is declared by its terms to be within five days next after delivery, applies to such railroad, and is not void as impairing the obligation of the contract as to rates between it and the State.

The legislature has power to compel railroad companies and other like common carriers to discharge the duties and obligations they owe to the public and individuals who travel on and ship freight over the roads by reasonable statutory regulations, and to compel a due observance of these by fines and penalties.

The issues submitted to the jury and the responses to them were as follows:

1. Did the plaintiff, on the 21st day of November, 1884, deliver to the defendant at its warehouse in Mount Olive 27 bags of rice for shipment to Henry Lee & Co., at Goldsboro?

Yes.

2. Was said rice the property of the plaintiff?

Yes.

3. Was said rice reeeived by defendant for shipment?

Yes.

4. Did plaintiff agree or consent that said rice should remain unshipped?

No.

5. Was said rice received by defendant without payment of freight and without demand therefor?

Yes.

6. Did defendant unlawfully allow said rice to remain unshipped at its warehouse in Mount Olive from the 21st day of November, 1884, until the 21st day of March, 1885?

Yes.

The following are the exceptions of the defendant:

1. To the exclusion, on objection by plaintiff of the following question asked by defendant of the witness, J. H. Toler, viz.: "Did persons who delivered rice for the plaintiff give any instructions at the time of delivery in regard to the time of shipment?"

2. In not sustaining the objection of defendant to the following question asked by plaintiff of the witness, J. H. Toler, viz.: "Have you examined the defendant's books, and do they not show that this lot of rice has not been entered?" The defendant proposed to ask the witness the following question, viz.: "Did persons who delivered rice for the plaintiff give any instructions at the time of delivery in regard to the time of shipment?" Objected to by plaintiff. Objection sustained.

Defendant excepted.

On cross-examination the witness testified that he was not now agent for the company, and that it was his custom to enter freight on the books when shipped, and not before.

The plaintiff then proposed to ask the witness: "Have you examined the defendant's books, and do they not show that this lot of rice was not entered?" Objected to by defendant on the ground that the books were the best evidence. Objection overruled.

Defendant excepts.

The witness answered: "I do not think I have examined the defendant's books. I do not remember whether this lot of rice was on the books. I think the books show shipments between November 21st, 1884, and March 21st, 1885."

After the evidence was closed and before the charge was delivered to the jury, His Honor asked the defendant's counsel that any instructions were given by the plaintiff or his agents not to ship the rice, about which the matter in controversy arose, to which he replied he did not; that the only question was whether or not the rice had been shipped, and that His Honor might answer all the issues except the sixth in favor of the plaintiff.

The defendant's attorney insisted that the plaintiff could not re-

cover on account of the following words in the bill of lading, viz.: "No liability will be assumed for wrong carriage or wrong delivery of goods that are marked with initials, numbered or imperfectly marked."

His Honor reserved the question, and charged the jury as follows, viz.: "If you find the first issue in the affirmative, the contract made by the defendant with the plaintiff, as set out in the bill of lading, was to ship the 27 bags of rice in a reasonable time, and the law has fixed such time to be five days after its receipt, unless it was otherwise agreed. You will then proceed to inquire whether the rice was shipped within the time named; if not, was it by reason of agreement made at the time of delivery? This will depend upon your finding upon the issue. If the rice was shipped, as alleged by the defendant and testified to by Toler, you will answer the last issue in the negative. If, however, you find upon the evidence that it was not shipped until March 21st, 1885, you will answer the issue in the affirmative. The defendant sets up no excuse for a failure to ship, if there was such failure. You will not permit the fact that the defendant is a corporation to in any manner or to any extent affect your verdict. You must try the issues as between two natural persons. Prejudice or partiality should have no place in the jury box. You will not permit the amount claimed by the plaintiff to affect your verdict. The law fixes the measure of the defendant's liability and the plaintiff's rights; and you should find the issues according as upon the whole evidence you believe the truth to be. The burden of proof is upon the plaintiff upon the issues. You will find the facts as you may find the preponderance of the evidence. The plaintiff is confined to the rice delivered by Merritt, and you cannot consider the evidence in regard to the Phillips & Garner.

3. His Honor erred in his charge that "the contract made by defendant with the plaintiff, as set out in the bill of lading, was to ship in a reasonable time, and the law has fixed such time to be five days after its receipt unless it was otherwise agreed. You will proceed to inquire whether the rice was shipped within the time named; if not, was it by reason of agreement made at the time of delivery. This will depend upon your finding upon the issue."

4. His Honor erred in stating to the jury that, defendant sets up no excuse for a failure to ship, if there was such failure.

5. His Honor erred in stating to the jury that they could not consider the evidence in regard to the Phillips-Garner rice except as throwing light upon the question as to whether the Merritt rice was or was not shipped.

6. His Honor erred in deciding the question reserved against the defendant.

7. In giving judgment for plaintiff.

MERRIMON, J.—The first exception cannot be sustained. What the witness would have said in reply to the question specified it does not appear, as it should do, but inferring that he would have answered in the affirmative, such evidence was irrelevlant and immaterial. The plaintiff sued to recover penalties which he alleges the defendant incurred by the failure to ship twenty-seven bags of rice marked [a], as it was bound to do within five days next after the rice was delivered to it for shipment. The evidence of the plaintiff, including the bill of lading, went to prove that the particular bags of rice in question were delivered by his agent, the witness Robert Merritt, to the defendant for shipment on the 21st day of November, 1884. The only witness introduced by the defendant, J. H. Toler, testified that he was agent for the defendant at the station where the rice was delivered for shipment on the day named and that he did not receive any instructions not to ship it, but on the contrary, he testified that he did ship it. Whether he did or not was the sole question at issue. It was not, therefore, material to inquire whether persons who delivered rice for the plaintiff to the defendant gave directions in respect to the time of shipment, or not. As to the rice in question, the uncontradicted evidence both of the plaintiff and the defendant went to show that no instructions were given not to ship it. This being so, in the course and order of such business, it was the duty of the defendant to ship the rice promptly.

INSTRUCTIONS CONCERNING SHIPMENT—REFUSAL OF QUESTION.

This leaves out of view the evidence of the witness of the plaintiff who testified that he told the agent of the defendant to ship it, and the latter promised to do so within two or three days.

2. Nor can the second exception be sustained. If it be granted that the book of shipment referred to should have been produced, the answer to the question objected to by the defendant did not prejudice it; it was not favorable to the plaintiff at all, but rather tended to help the defendant. When the question objected to but allowed elicits nothing material and nothing to the prejudice of the party complaining, this is not ground for a new trial. A new trial in such case will be granted only when such party has suffered prejudice or has probably done so. We think also that the third exception is groundless.

It is clear that, in the absence of any express contract between the shipper of goods and the common carrier to the contrary, if the latter receives goods to be shipped, there is an implied agreement on his part to ship them within a reasonable time, and the statute (the Code, sec. 1907) has fixed that time to be within five days next after the carrier received the goods for shipment.

SHIPMENT OF GOODS WITHIN REASONABLE TIME—STATUTE.

Besides, the statute expressly provides, that the carrier, a railroad company, shall ship them within five days after it receives the

goods for shipment, unless otherwise agreed between the company and the shipper. Branch *v.* W. & W. R. Co., 77 N. C. 347.

4. And so also the fourth exception is without force. The court manifestly intended to tell the jury, and did so in effect, that the defendant had not set up any legal excuse for failing to ship the goods, but it was cautious to say in that immediate connection, "if there was such failure," this leaving to them the sole question submitted to them, by both parties conceded, "whether or not the rice had been shipped."

FAILURE TO SHIP GOODS—EXCUSE.

5. The fifth exception is without merit; the evidence is in respect to the rice delivered by Phillips and Green for the plaintiff to the defendant was immaterial; that rice was not in question. The sole question was whether or not the twenty-seven bags of rice delivered by Merritt for the plaintiff were shipped.

RICE DELIVERED BY OTHER PARTIES FOR PLAINTIFF.

As we have seen, the evidence of the defendant as well as that of the plaintiff showed that as to that rice, there were no instructions not to ship it. This being true, what just or proper weight could the testimony as to the rice delivered by the parties first named have upon the matter in issue?

6. Nor can the sixth exception prevail. The liability provided against by the exceptive words in the bill of lading set forth in the exception is to "wrong carriage or wrong delivery of goods that are marked with initials, numbered, or imperfectly marked."

THE QUESTION AT ISSUE.

It is no part of the plaintiff's complaint that the rice was wrongly carried or wrongly delivered to a supposed consignee; the ground of the action is, that it was not shipped at all. It was not set up as a matter of defence that the rice was not marked with proper directions, nor was any imperfection in that respect brought to the attention of the plaintiff within a reasonable time, as ought to have been done if they existed.

What we have said in effect disposes of the seventh exception. We see no reason why the court ought not to have given the judgment it did give. The twenty-sixth section of the defendant's charter (2 Rev. Statutes, p. 344) provides that its officers may establish its price rates of freights and fares in their discretion, not exceeding a maximum prescribed. The counsel of the defendant appellant contended in his brief that the statute (The Code, sec. 1967) could not be construed as applying to it, or if so, as to the defendants, it was void, because it impaired the obligation of the contract between it and the State in the respect mentioned.

DEFENDANTS CHARTER—IMPAIRMENT OF CONTRACT.

The statutory provision last cited applies to all railroad companies doing business in this State, and its obvious purpose is to compel them to ship over their roads respectively goods delivered to them for shipment within a reasonable time after receiving them, which

is declared by its terms to be within five days next after that time. The legislature has deemed it a just, reasonable, and necessary regulation, and it is the plain duty of the courts to give it effect in all proper cases in the course of procedure. It is severe, it is true, but it is not unreasonable. It may be observed without serious inconvenience and yet it seems that it is not unfrequently disregarded, thus demonstrating the necessity for it.

That the legislature has power to compel railroad companies and other like common carriers to discharge the duties and obligations they owe to the public and individuals who travel on and ship freight over the roads, by reasonable statutory regulations, and to compel a due observance of these by fines and penalties, is too well and thoroughly settled by judicial authority to admit of question. Because of their *quasi* public nature—their relations to the public—the fact that they hold themselves out to the world as ready to carry freights for shippers regularly for reasonable compensation and especially as to railroad corporations, because they have and exercise franchises, rights, privileges, and advantages of the public, and granted by the public authority, they are subject to just legislative control. POWER OF STATE TO REGULATE CARRIER.

The legislature may reasonably regulate their methods of business in a general way so as to promote the public good, having due regard for their rights in all respects. They have rights as well as the public that the law protects, but to the extent that the exercise of their rights by themselves concern and affect the public; the latter, through its constitutional authority, must have a voice in such exercise of them. This court has repeatedly upheld the statute now under consideration as a valid exercise of legislative authority. Indeed, it has been so upheld in its application to the defendant. Branch *v.* W. & W. R. Co., *supra.* See also Katzenstein *v.* Railroad, 87 N. C. 255.

This statute does not regulate the price of freights and fares of the defendant, nor does it purport to do so. It simply imposes a penalty of twenty-five dollars on each railroad doing business in this State for every day it may fail to ship goods delivered to it for shipment after five days next after such delivery, unless the shipper and the company agree otherwise. It leaves the defendant free to determine its charges for carrying freights; its only purpose is to compel it to ship goods promptly in the absence of agreement otherwise. The provision of the defendant's charter referred to above does not abridge the power of the legislature to make all reasonable regulations to expedite and render certain the shipments of freights over its roads. There is nothing in its charter that in terms or by necessary implication indicates a purpose to part with such power.

It is difficult to understand how the legislature could part with or barter away any measure of an essential power of government;

but if it could do so at all, it could only do so by positive grant, or by words and provisions so plain in their meaning as to leave no doubt of such purpose. Stone *v.* Farmer's Loan and Trust Co., 116 U. S. 307; Stone *v.* Railroad Co., Ib. 352; Missouri Pacific R. Co. *v.* Humes, 117 U. S. 512.

There is no error, and the judgment must be affirmed.

Judgment affirmed.

Penalties—When Railway Company Liable to, as Common Carriers—Delay.—A railroad company is not exempt from the liability to penalty of $25 per day, under the act of 1875, ch. 240, for delay in shipping goods beyond five days after the receipt thereof, by reason of its alleged inability to transport the same on account of the large accumulation of freight. It is presumed to be the company's duty to provide a sufficient number of cars.

In the statute providing a penalty for five days' delay in shipment, the words "five days" in the act mean five full running days, including Sunday whenever it intervenes. And there would be no liability to the penalty upon the company until the full expiration of the sixth day after receiving the goods, as in the enforcement of a penal statute the law does not regard the fraction of a day. Keeter *v.* Wilmington & Weldon R. Co., 86 N. C. 346.

In Whitehead *v.* Wilmington & Weldon R. Co., 87 N. C. 255, an action by the plaintiff against a railway company for the penalty for delay in shipment of cotton under the act of 1874–5, ch. 240, due to increase of freight, refusal of a connecting road of the same through line to transfer defendant's flat cars over its road loaded with cotton, the detention of defendant's box cars at terminus of said connecting road, and to company's being unable to procure other cars in time to ship plaintiff's cotton, and not by its competition with other lines for through freight, the defendant not being responsible for the causes of delay, it was *held* that the burden was on the defendant to show an agreement to waive such penalty.

Excessive Charge.—The legislature can establish rates of toll for passengers and freights and enforce the same by penalties. State *v.* Winona, etc., R. Co., 19 Minn. 434.

Railway corporations possess and can exercise such powers only as are expressly conferred upon them by law, and their power to demand fare of a passenger is not an implied or incidental power, but is derived solely from the statute. 2 Sweeney (N. Y.) 298.

Where the statute law limits the rate of freights and fares to be received by a railroad corporation for the transportation of passengers and carriage of freight, and gives a right of action for the violation of the law by the taking of a greater compensation, no protest is necessary on the part of the person paying such excessive rates to entitle him to such statutory right of action. Though voluntarily paid, if exacted, and with full knowledge of the law, yet the party may recover under the statute without showing that he protested against the payment. In such cases the law gives the action, and no protest is required. The well-known rule as to voluntary payment does not apply where the right of action is expressly given by statute. Streeter *v.* Chicago, etc., R. Co., 40 Wis. 294.

A right of action accrues in the behalf of a person subjected to excessive charges as soon as such excessive rates are exacted and received by the company; therefore, for such illegal exactions up to the time of action recovery can be had but for one penalty by the same party, however often excessive charges may have been repeated, in the absence of a statutory provision to the contrary. The penalties cannot be allowed to accumulate in favor of the same person and then be recovered collectively in the one action. Fisher *v.* The New York Cent., etc., R. Co., 46 N. Y. (1 Sickles) 644.

In this case the court, GROVER, J., says: "My conclusion is that but one penalty can be recovered upon the statute under consideration for all acts committed prior to the commencement of the action. If after this it is again violated, another may be recovered in another action commenced thereafter, and so on as long as violations continue. This will not only tend to put a stop at once to the extortion, when it is committed knowingly by the defendant, but where it is done under a mistake as to its rights, will give it notice that its right to charge the amount claimed is challenged, and will induce a cautious examination of the question, and an abandonment of the claim before a ruinous amount of penalties have been incurred."

The penalty for taking excessive rates can be recovered, although the party suing has patronized the road and paid such excessive charges with the express intention of obtaining the right of action. It is no defence to the defendant that the plaintiff intended to bring about a violation of the law. The object of the statute is not so much to vindicate the individual right as the public law. Fisher *v.* New York Cent., etc., R. Co., *supra.*

Illegal Notes.—When a conductor, in making change to passenger, pays out an illegal note, the penalty cannot be recovered from the company, unless proven that he had authority from the officers of the company to do so, but this authority may be inferred from circumstances. An open and notorious custom among all the ticket agents and conductors employed by a railway company is evidence that should be left to a jury to enable them to determine whether the custom was authorized by the company. Commonwealth *v.* Ohio, etc., R. Co., 1 Grant's Cases (Penn.), 329.

Forfeiture of Franchise.—An act of the legislature making any discrimination on the part of railroad companies in their charges for freight a penal offence, and providing for a forfeiture of all their franchises for any wilful violation of the act, without any other penalty for the first offence, is in violation of the spirit of the constitutional provision which requires all penalties to be proportioned to the nature of the offence, and also of § 15 of Art. 11, under which such a law is framed, which only authorizes the penalty to extend to forfeiture of franchises and property, "when necessary for that purpose." Chicago and Alton R. Co. *v.* The People, 67 Ill. 11.

Form of Action.—A State's Attorney will not be allowed to bring an action for a statutory penalty for his own use and gain. People *v.* Wabash, St. Louis, etc., R. Co., 12 Bradwell (Ill.) 263.

In an action *qui tam*, a person has no vested title in a penalty until by a recovery he reduces the claim to a judgment. Chicago and Alton R. Co. *v.* Adler, 56 Ill. 344.

A suit brought to recover a statute penalty is not an action upon a contract within the meaning of § 129 of the Code, and the summons in such an action should be in the form prescribed by sub-division 1 of that section. McCann *v.* New York Central, etc., R. Co. and Harlem R. Co., 50 N. Y. 176.

See also Wabash, etc., R. Co. *v.* People, 12 Am. & Eng. R. Cas. 10; Louisville, etc., R. Co. *v.* Railroad Comm., 16 Ib. 1; Parks *v.* Nashville, etc., R. Co., 18 Ib. 404; Houston, etc., R. Co. *v.* Harry, 18 Ib. 502; Smith *v.* C. & N. W. R. Co., 1 Ib. 303; Katzenstan *v.* Raleigh, etc., R. Co., 6 Ib. 464; Rector *v.* Wilmington, etc., R. Co., 9 Ib. 165; Whitehead *v.* Wilmington, etc., R. Co., 9 Ib. 168; U. S. *v.* East Tenn., etc., R. Co., 9 Ib. 259; Herriman *v.* Burlington, etc., R. Co., 9 Ib. 334.

MILNE

v.

CANADA PACIFIC R. CO.

(*Advance Case, First Division Court, County of Ontario, Canada. October* 28, 1886.)

A railway station agent to whom tickets are issued for sale is bound to account therefor in cash or tickets, and must give a reasonable explanation for any deficiency, or otherwise be charged the amount which the company would have earned if the tickets had been sold.

The omission by a station agent to date a passenger ticket does not invalidate it.

The plaintiff had been agent of the defendants at a station on their line named Pontypool, at a salary of $35 per month.

Among his other duties he had charge of the passenger tickets from his station to others on the line, and was required to make returns of the amount sold, and to pay over the cash proceeds. He gave receipts for all tickets received from the head office.

On leaving the defendants' employ, the relieving agent took over his office, and tickets were found short as follows: Two tickets to Perth, fare $4.30 each, and two return tickets to Toronto, fare $2.95 each. The defendants proposed to charge the plaintiff with these sums, amounting to $14.60. He refused to accede to this, and sued the company for the full amount of his arrears of salary. The defendants paid the claim with costs into court, less the above sum of $14.60.

The plaintiff advanced no theory to account for the loss of the tickets. It was admitted that the missing tickets had not turned up at the central office.

The defendants' solicitor at the hearing expressly disclaimed any reflection upon the good faith or honesty of the plaintiff, and stated that the defendants asserted their claim solely on the ground of the importance of the question to their corporation. A written judgment was asked for, in order that employees of the company should become fully aware of their duties and responsibilities under similar circumstances.

G. Y. Smith for plaintiff.

Rupert M. Wells for defendant.

DARTNELL, J.—Although the amount involved in this action is comparatively small, the principle involved is of serious import to corporations and employees. The *ad captandum* argument was used that it was beneath the dignity of a large corporation to resist this claim; but it is obvious that the

IMPORTANCE OF CASE.

larger the corporation the greater should be the vigilance in guarding against little leaks. A multitude of such will sink a large ship. A pin scratch may be but a trifling wound, but a man may bleed to death if pricked all over his body. Upon the faithful and efficient performance of every duty by *all* the units of the vast army of the employees of an immense corporation will depend the earning powers of the company.

It was stated that no express authority can be found upon the matter in controversy, and I myself have been unable to find any, after diligent search. I think, however, it is not difficult to arrive at a judgment based upon general and well-defined principles of law.

NATURE OF RAILROAD TICKETS—AUTHORITIES.

It will be necessary in the first place to consider and ascertain what is the nature of the documents (for such railway tickets are) in respect of which the defendants seek to make a deduction from the plaintiff's claim, and how far possession and user of such tickets by parties who obtain them unlawfully may affect the defendants' interests.

"Tickets issued by a railway company are *primâ facie* evidence of a contract between the railway and the passenger to transport the latter, and his personal baggage, from the station named thereon as the place of departure to the station named thereon as the place of destination; and is held to be a receipt, token, or vouchier showing payment for the passage, rather than a contract; and by its purchase the relation of passenger and carrier is said to be consummated. The contract between the passenger and the company, by which the ticket was issued, is implied by law, except so far as it is expressed upon the face of the ticket. A ticket which bears on its face no qualifications, conditions, or limitations as to its use is undoubtedly good for a passage from the station of departure to the station named thereon any time within six years from its date, provided it has not been mutilated so as to bear the appearance of having been used. In Maine by statute it is provided that a passenger may not only stop over at any intermediate station, but also that the ticket shall be good for a passage at any time within six years from its date."—Wood on Railways, vol. 2, chap. 21, sec. 346, page 1394.

"As between the conductor and the passenger the ticket is the only evidence of the passenger's right to a passage, and he must produce it when called for. . . LOST TICKET. . . And if he loses the ticket his right to travel on it ceases; and if, after having been given a reasonable time to find it, he fails to pay his fare, he may be expelled from the train, and this, even though the conductor has once punched the ticket and knows that the passenger had it." Wood on Railways, vol. 2, page 1407, chap. 21, sec. 350.

Where a passenger paid for three tickets, but through mistake the agent only gave him two, which he gave to two persons with

him, it was held that he must pay his fare or the conductor would be justified in removing him from the train. Duke *v.* G. W. R. Co., 14 U. C. Q. B. 377; and the same is true where the ticket agent gives the passenger a ticket for a shorter distance though paid for a ticket to a point beyond. Weaver *v.* Rome, etc., R. Co., 3 T. & C. N. Y. 270.

So where a passenger was expelled from a street car because the conductor of the other car had given him a wrong check it was held that he had no cause of action. Frederick *v.* Marquette, etc., R. Co., 37 Mich. 342. As between the conductor and the passenger the ticket is the only evidence of the passenger's right to a passage. Bradshaw *v.* South Boston R. Co., 135 Mass. 407; Happard *v.* Grand Rapids, etc., R. Co. (Mich.), 18 N. W. Rep. 580.

In Frederick *v.* Marquette, R. Co., 37 Mich. 342, 26 Am. Rep. 531, it was decided that as between the conductor and the passenger the ticket must be the conclusive evidence of the extent of the passenger's right to travel; no other rule can protect the conductor in the performance of his duties, or enable him to determine what he may, or may not, lawfully do in managing the train and collecting the fares. The court said: "If when a passenger makes an assertion that he has paid fare, though he can produce no evidence of it, the conductor must, at his peril, concede what the passenger claims, or take all the responsibilities of a trespasser if he refuses. It is easy to see that his position is one in which any lawless person, with sufficient impudence and recklessness, may have him at disadvantage, and where he can never be certain, if he performs his apparent duty to his employer, he may not be subjected to a severe pecuniary responsibility. Such a state of things is not desirable, either for railroad companies, or for the public. The public is interested in having the rules whereby conductors are to govern their action certain and definite, so that there may be no stoppage of trains; and if the enforcement causes temporary inconvenience to a passenger who by accident or mistake is without his proper evidence of his right to a passage, though he has paid for it, it is better that he submit to the temporary inconvenience than let the business of the road be interrupted to the general annoyance of all who are upon the train. The conductor's duty, when the passenger is without the evidence of having paid his fare, is plain and imperative; and it can serve no good purpose, and settle no rights, to have a controversy with him.

In some of the States of the Union it has been held that railway tickets are not the subject of larceny at common law. (1 Hersh Crim. Reports, Delaware).

RAILWAY TICKETS AS SUBJECT OF LARCENY.

Regina *v.* Boulton, 3 Cox. C. C. 576, decides that a railway ticket is a chattel; and in Regina *v.* Beacham, 6 Cox, C. C. 181, it was held that the fraudulent taking of a railway ticket for the purpose of using it to travel, and so defrauding the railway company, is larceny; although the

ticket would, if used, be returned to the company at the end of the journey.

By our own Larceny Act (Sec. 19) the stealing of a railway ticket is made a felony.

A railway agent is allowed a reasonable time to remit money received for tickets or freight; otherwise he would not be liable if robbed. Robinson *v.* Illinois Central R. Co., 30 Iowa, 401.

From these cases and the well-known usages and customs of railway corporations of may be deduced that a railway ticket is a valuable security; the holder of it has a right to travel upon its production (subject to any limitations expressed upon its face, and to a certain extent it is as much negotiable by delivery as a bank bill.

RAILWAY TICKETS COMPARED TO BANK NOTE.

The latter is redeemable in gold, the former is redeemable in so many miles of travel—indeed in certain cases it is redeemable in cash; for by "The Railway Passengers' Ticket Act" of 1882, popularly known as the "Scalpers Act" (45 Vic. Cap. 41) it is provided "that the company shall repay to any ticket holder the cost of his ticket if unused in whole or in part, less the ordinary and regular fare for the distance for which such fare had been used."

It would be a dangerous thing for a conductor to inquire into the title of each passenger to the ticket he produces, and it would be against the general interests of the public that he should do so.

It was argued that as the missing tickets were not dated that they were invalid. I do not agree with this. I do not think a conductor would be safe in rejecting an undated ticket. The date is placed upon it for the convenience of the company to show the time from which may be calculated the limit of their liability, in accordance with the terms indorsed upon the ticket, or by operation of law. Again, by Sec. 3 of the act above quoted, it is provided that when tickets are sold by authorized agents, other than station agents, the name of such agent and the date of sale must be written or stamped upon the ticket; and Sec. 7 provides in effect that the sale of tickets in the ordinary way by station agents shall not be affected. By implication, therefore, the dating and countersigning of a ticket is not necessary in such cases, but is confined to the issue of tickets by agents other than station agents. Nor is there force in the argument that because the missing tickets have not turned up at the audit office (it being the duty of the conductor to transmit them on taking them up) that they have not been used, and that, therefore, the company has lost nothing. It is well known that a large percentage of tickets, *bona-fide* bought and used, for various reasons are not presented to, or taken up by, the conductors, and so never reach the audit office. These tickets are even now liable to be presented, and the holders travel thereon,

OMISSION TO DATE TICKET DOES NOT INVALIDATE IT.

WHETHER MISSING TICKETS HAVE NOT BEEN USED.

and the defendants, defrauded of the fare which would have reached their treasury if accounted for in the usual way.

If I am intrusted with a number of tickets to sell for a charitable concern I must account in cash or tickets for the whole number, or give some reasonable explanation for any deficiency. Or if a friend hands me $500 to take care of, and on returning even the identical packages with a shortage of several bills, surely I must give some satisfactory reason for the shortage. In these cases I would be a gratuitous bailee, but none the less liable.

PLAINTIFF LIABLE TO ACCOUNT FOR MISSING TICKETS.

But the plaintiff in this case was a bailee for hire. .It was just as much within the scope of his duties to take reasonable care of these tickets, the loss of which and their subsequent user would deprive the defendants of so much earnings, as stationery, books, office furniture, or other property of the defendants intrusted to his care. He would not be liable for loss by fire or robbery unless caused by his neglect. I see no distinction in this case and that of a teller in a bank in charge of so much cash. Such bailee must give a reasonable explanation of any deficiency, and as the plaintiff does not attempt in any way to account for the four missing tickets, it appears to me to be beyond doubt that he was properly charged with the sum of $14.60, and I give judgment for him for the amount paid into court only. The defendants will be entitled to charge against the latter amount any witness fees paid by them in order to establish their defence.

Railroad Tickets as the Subject of Larceny.—In the case of State v. Hill, 1 Houston Crim. Reports (Dela.), 420, it is held that a passenger railroad ticket is not a subject of larceny at common law. The court said: "The rule at common law is that larceny can only be committed of personal property, or goods and chattels which have some intrinsic value, or a value in itself, withous reference to any other matter or thing. The intrinsic value of a piece of printed pasteboard merely is not even appreciable in any coin we have, and as we have no statutory provision making such an article as this railroad ticket a subject of larceny, we do not think the indictment can be sustained, and we must therefore direct the jury to acquit the prisoner."

But in the case of State v. Farmer, 46 N. H. 200, it is held that if a servant of a railway corporation having custody of passenger tickets that had once been sold and taken up, fraudulently abstracts them and sells them for his own use, it will be larceny of such tickets.

ELLIS

v.

MILWAUKEE CITY R. Co.

(*Advance Case, Wisconsin. November* 3, 1886.)

After the plaintiff took passage on one of defendant's street cars, he was informed by the conductor that the car he was on did not run to the place to which he desired to go, and that he would have to take another car and pay another fare. At the point of divergence the plaintiff demanded a transfer ticket, which was refused. He then left the car and entered another car bound for his destination, from which he was ejected for refusing to pay another fare. An ordinance of the city of Milwaukee, enacted in 1871, provided that, "thereafter the rate of fare for a single passenger in any horse railway operated within the city of Milwaukee shall not exceed the sum of five cents." The line upon which the plaintiff was riding at the time he was expelled was constructed after this ordinance was enacted. In an action to recover damages for such ejection, *Held*,

1. That a regulation of the company by which several distinct and separate lines of cars were run between different termini was a reasonable one.
2. That the ordinance of 1871, fixing the rate of fare, had no application to the connecting lines of road afterwards constructed.

Appeal from County Court, Milwaukee county.

Action to recover damages for being ejected from a street car in the city of Milwaukee. The facts appear in the opinion. Plaintiff recovered damages amounting to $150 in the County Court, Milwaukee county. Defendant appeals.

Small & Hopkins for respondent, Ellis.

Finches, Lynde & Miller for appellant, Milwaukee City R. Co.

ORTON, J.—The plaintiff and respondent on this appeal, in June, 1885, entered one of the cars of the defendant company at the corner of Fourth avenue and Mitchell street, in the south part of the city of Milwaukee, for the purpose of going to the base-ball ground at the corner of Twelfth and Wright streets, in the north part of said city, to which point one of the cars of said company ran on one line of its road. He was informed by the conductor, when he offered to pay his fare of five cents, that the car he was on did not run to that point, and that to get there he would have to take another car, but that he could ride as far as it ran on that line, and then he would have to take another car, and pay another fare of five cents on the same. The plaintiff then asked the conductor if he would not give him, at the point of divergence, a transfer ticket, which would entitle him to ride to his destination, and the conductor told him that he could not, and he then paid his fare. At the point where the road to the base-ball

FACTS.

ground diverged from the line on which that car ran, the plaintiff again demanded a transfer ticket, which was again refused, and he left the car, and waited a short time for the arrival of another car bound for his destination, and then entered that car. The conductor of that car asked the plaintiff for his fare, and he replied that he had paid his fare on the Third street car, and refused to pay more fare. He was informed that if he did not pay he must leave the car, and he replied that he would not do so. The conductor delayed putting him off until he had made three other demands for his fare, and he had refused, and then he stopped the car at a crossing, and, by no great display of force, put the plaintiff off. He landed on his feet, and suffered no injury, although he and the conductor were somewhat excited. After being thus put off, he almost immediately jumped on the car again, and paid his fare under protest, and rode to his destination.

CITY ORDINANCE —ITS EFFECT.

On the twenty-third day of October, 1871, the common council of the city passed an ordinance amending an ordinance of March 26, 1861, to amend an ordinance entitled "An ordinance to authorize the construction and operation of certain horse railways in the city of Milwaukee," passed May 29, 1865, as follows:

"Sec. 2. Hereafter the rate of fare for a single passenger in any horse railway operated within the city of Milwaukee shall not exceed the sum of five cents."

This ordinance was declared to have been passed for the sole purpose of preventing extortion by the said company. At the time the ordinance was passed this company was operating only one line of railway, north and south, near the center of the city, and near the Milwaukee river, and all cars thereon went to the same points of termination, and, as far as this company was concerned, this ordinance affected only this line of road as then operated. Afterwards, and before the year 1883, this company had constructed at least four lines of road, diverging from this main line, towards the south and towards the north, to as many points of termination and localities, and one of these lines ran to the base-ball grounds, the destination of the plaintiff. The car upon which he took passage did not run to that point, but to a point south of and quite distant from it. When these lines of road were built, by a regulation of the company, as many different lines of cars ran upon the main line, and to these several terminations, and these various lines were operated as distinct and separate lines of road. When, in 1882, the company was about to construct a line of road diverging from the old main line, and running along Chestnut street, the common council passed an ordinance authorizing such extension, and providing that such new line should be operated in connection with the main line, and that only one fare of five cents should be charged for the whole route, and that at the point of intersection

a transfer ticket should be given to the passenger going on such new line. Since the other diverging lines have been built and operated no ordinance has been passed relating thereto, in respect to rates of fare or transfer tickets, but these several lines are left to be governed, if at all, by the ordinance of 1871, as to the rate of fare. It appears that the company, on the completion of these several lines, for one year only adopted the plan of giving transfer tickets on all of them; but they found that, under such a regulation, passengers could defraud the company by getting on a line, go west a short distance, then go south a short distance, and then go back, and pass around a circle; and the company then abandoned such a general regulation, and has since given transfer tickets only on the Chestnut street line, as required by said ordinance.

This is a brief and substantially correct statement of the case. The plaintiff brought this suit to recover damages for being thus expelled from the car, and recovered $150.

On the conclusion of the plaintiff's testimony, as stated substantially above, there was a motion for a nonsuit, and at the conclusion of the evidence on both sides, the defendant company moved for a verdict by direction of the court, which was denied.

1. We think that the regulation or custom of the company by which several distinct and separate lines of cars are run between different termini is a reasonable one. The various lines could not be operated in any other way to accommodate the travelling public. Yorton *v.* Railroad Co., 54 Wis. 234.

SEVERAL LINES BETWEEN DIFFERENT TERMINI.

2. We are quite confident that the ordinance of 1871, fixing the rate of fare, has no application to the connecting lines of road afterwards constructed. The rates of fare of passengers on the road of such a corporation ought to be reasonable, affording a reasonable compensation to the common carrier, and imposing no unreasonable burden upon the passenger. Att'y Gen. *v.* Railroad Co., 35 Wis. 424. It may be conceded that the common council of Milwaukee had the right and authority to fix such reasonable rate by ordinance; but such rate should be fixed so as to give the company reasonable compensation for its service, in view of the location and length of its road. In respect to railways operated by steam power through the country, such rates for passengers, where fixed by law, are generally, if not always, rated per mile. In such case the length of lines and distance of travel would make no difference. On horse railways the fare is generally fixed at a certain sum for a given line of road, arbitrarily; but should, of course, be so fixed as to be reasonable, and proportionate to the service rendered to the passenger, and to the profits of the company. It is presumed that the common council fixed the rate in 1871 in view of this rule, and took into consideration the location, business, and length of the main line

OLD ORDINANCE FIXING RATE DOES NOT APPLY TO LINES BOUGHT AFTERWARDS.

then in operation. Suppose the legislatures of Illinois and Wisconsin had seen fit to fix the fare on the Chicago & Northwestern Railway at the arbitrary rate of five dollars as soon as the road had been completed from Chicago to Madison, and that company had then no other line. Afterwards the line was extended, and many intersecting lines had been built. Would that rate continue, by the mere force of such a law, as the rate from Chicago to the distant terminus of its line, and to any termini of connecting lines? If so, the rate would be most unreasonable against the company, and the company would derive no compensation or profit whatever from such extended and new lines. If the rate was reasonable when the line had its termini at Chicago and Madison, as it must be presumed it was, then such a fixed rate becomes more and more unreasonable as the line is extended, and connecting lines are built, and increased service is rendered, at great additional cost to the company. So, in this case, the common council fixed this arbitrary rate, presumed then to be reasonable, on the old and main line of road. That line has been extended and connecting lines built since such rate was fixed. That rate was fixed without any reference to the present state of things, or new lines, and with reference only to the roads then existing; and hence we say that the ordinance of 1871 has no application to the connecting lines since constructed.

The common council, as the legislative body in respect to such ordinances, fixing the rate of passenger fare over its lines of street railway, has placed such a legislative construction upon the ordinance of 1871 by another ordinance of 1882, by which the same rate is continued on the main line and on the first connecting line, and a transfer ticket required to be given. On the subject of the fare on the main line, and on the other connecting lines, the common council has not acted. The ordinance of 1871 has been treated as if made with special reference to this road. What has been said would be true of all other roads in their then condition, and in respect to their new lines.

3. It would not seem to be material whether the ordinance of 1871 actually fixed the rate of passenger fare on the main line and over the connecting lines since built, or not; for the company conceded to the plaintiff the right to go upon the car he was on to the end of its route, on one of the connecting lines, for the fare he had paid; and also to have gone over the main line and the connecting line to his destination, for the same fare, if he had taken the proper car of the company which runs on that line. We have already said that the regulation or custom by which these several lines of cars were run on the several lines of road was reasonable, and probably necessary. The plaintiff was informed of this regulation before he paid his fare. The company had provided for him cars to his destination,

PLAINTIFF WAS PROPERLY EJECTED.

and all he was required to do was to go aboard such cars. He chose not to do so, but to go aboard the wrong car, and demand that he may be carried to his destination on one fare of five cents, and to be transferred to another line for that purpose. These matters are proper subjects of legislation by the common council, and until they pass an ordinance changing the rate of fare, or fixing the rate of fare over all the lines of road, and requiring transfer tickets from one road to another to be given to passengers, the travelling public must comply with and abide by the present regulation. Such a regulation is binding upon travellers having knowledge of it. Bradshaw *v.* Railroad Co., 135 Mass. 407; Wakefield *v.* Railroad Co., 117 Mass. 544. In this last case the passenger had paid his fare on two connecting lines of the road, and claimed to ride on a third line. He was ejected from the third line, and was not allowed to recover. In McMahon *v.* Railroad Co., 47 N. Y. Super. Ct. 282, it was held that a similar regulation was binding upon a passenger, if known to him.

The plaintiff could easily have taken the proper car, and gone to his destination on one fare. But he chose to violate a reasonable regulation of the company by going upon the wrong car, and demanding of the conductor a transfer ticket, which the conductor, by such regulation, had no right to give, and he knew it. Until the company's rates are fixed by law for a transfer of a passenger to another line of its road, the company has a right to fix such rates as are reasonable, and there was no evidence in this case that such rates were not reasonable. The jury should have been instructed to find a verdict for the defendant. If the plaintiff had been entitled to recover at all in this case, he was only entitled to nominal damages. He was ejected from the car by the conductor, whose duty it was to do so, after repeated warnings, in an unusually careful and prudent manner, without inflicting upon him any personal injury. Yorton *v.* Railroad Co., *supra*. But he was not entitled to recover, and therefore the excessive verdict is immaterial.

The judgment of the County Court is reversed, and the cause remanded, with directions to that court to grant a new trial in the cause.

MISSOURI PACIFIC R. CO.

v.

MCCLANAHAN.

(*Advance Case, Texas. October* 19, 1886.)

By the general laws of Texas, 18 Leg. 70, railroad companies are required to keep open their ticket offices for one half hour before the departure of trains, and are allowed to collect extra fare from those who fail to purchase tickets at offices thus kept open. The plaintiff arrived at defendants' station within the half hour before the regular time for the departure of the train and found the ticket office closed. The train on this day was about an hour late. The office was not kept open for thirty minutes before the train actually left and he entered the cars without a ticket. Upon his refusal to pay the extra fare demanded of passengers not provided with tickets, he was ejected by the conductor. In an action against the company for damages it was *held*, that the company had no authority to demand this extra fare when it failed to observe the statute, even though the passenger did not apply for his ticket during the specified time, and if they eject one thus refusing to pay the extra fare they are liable for damages.

APPEAL from Anderson county.
John Young Gooch for appellant.
T. J. Williams for appellee.

GAINES, J.—Appellee boarded appellant's train at Tucker station to go to Palestine, and was put off two miles from the former place because of his failure to pay fare at the rate of four cents per mile, demanded by the conductor. Upon his arrival at the station, in the first instance, he went to the ticket office to buy a ticket, but found it closed. This occurred within half an hour before the regular time for the departure of the train. The train on this day was about an hour late. He made no further attempt to procure a ticket. The office was not kept open for thirty minutes before the train actually left, and he entered the cars without a ticket. He tendered fare at the rate of three cents a mile, but four cents was demanded, and upon his failure to pay he was ejected by the conductor. For this he obtained a verdict and judgment in the court below against appellant for the sum of $500.

FACTS.

The court charged the jury as follows: "If the ticket office at Tucker station is [was] not kept open for one half hour before the departure of the train from which plaintiff was ejected, then the conductor had no right to charge plaintiff more than three cents a mile, or to eject him because he did not pay four cents a mile, regardless of whether plaintiff applied for a ticket or not during said half hour." And defendant's counsel

CHARGE TO JURY.

thereupon requested the court to give the following special instruction, which was refused: "In addition to the charged heretofore given, I further charge you that if, in fact, the railroad company, or its agents, did not open the ticket office at Tucker station thirty minutes before the train departed therefrom on January 8, 1886, as alleged in the petition, yet if the plaintiff, J. H. McClanahan, did not apply within the thirty minutes for a ticket, he has no legal cause of complaint for such failure to keep said office open during said time. And if he did not seek to purchasea ticket at Tucker before the train mentioned departed, and he got on the train under such circumstances, without a ticket, the conductor of the train had a right to eject him, or cause him to get off of it, unless he paid four cents per mile." The giving of the former and refusal of the latter charge are assigned as error.

The rights of the appellant to claim the fare at the rate of four cents per mile, as demanded by the conductor, depends upon the construction of section 9 of the act of the legislature of this State regulating railroads and transportation lines in the State of Texas, approved April 10, 1883. See Gen. Laws, 18th Leg. 70. The section referred to fixes the passenger fare upon all railroads in this State at three cents per mile, and contains the following provisions: "Provided, however, that, where the fare is paid to the conductor, the rate shall be four cents per mile, except from stations where no tickets are sold; . . . provided, further, railroads shall be required to keep their ticket offices open half an hour prior to the departure of trains, and, upon failure to do so, they shall not charge more than three cents per mile." The first provision in the section, as quoted, was obviously intended to induce paisengers to buy tickets before entering the cars, and was doubtless inserted in the interest and for the protection of the railroad companies. The object of the second, on the other hand, was to protect passengers against the contingency of having to pay the advanced rate of fare without being afforded ample opportunity to procure tickets. There is nothing in the language of this provision to indicate that the legislature intended to make it other than an absolute rule; and we see no reason why its operation should be made dependent upon attempt or intent of the passenger to buy a ticket. If the railroad companies desire the benefit of the law in this regard, they have only to comply with it by keeping their offices open as the statute requires. The regulation is reasonable, and easy to be observed. In the opinion of the court, if these companies keep their ticket offices open half an hour before the departure of trains, they have a right to claim of passengers entering the cars without tickets fare at the rate of four cents per mile; but, if the office be not so kept open, in no case can more than three cents per mile be rightfully demanded. We conclude, therefore, that the court below did not

OPERATION OF STATUTE NOT DEPENDENT ON ATTEMPT OF PASSENGER TO BUY TICKET.

err, either in giving the charge complained of by appellant, nor in refusing the special instruction asked by their counsel.

The only other error assigned is the action of the court in overruling the motion for a new trial, which, being based upon the supposed errors in giving and refusing the respective charges hereinbefore set forth, raises the same question already passed upon. We therefore find no error in the judgment, and it is affirmed.

See Everett v. Chicago, R. I. & P. R. Co., and note, *post*, p. 98.

DULING

v.

PHILADELPHIA, WILMINGTON AND BALTIMORE R. CO.

(*Advance Case. Maryland, November* 12, 1886.)

The plaintiff purchased of the defendant, a railroad company, a ticket from E. to S., when a train was approaching in the direction he wished to go. He boarded that train, and found by the company's regulations that train could not and would not stop at S. He got off at the last stopping-place before reaching S., and walked the remaining distance. He sued the company for selling him a ticket by another train, which he claimed was represented to him as then about to proceed from E. to S. It was contended in the trial that it was a custom of the company not to sell a ticket to a station unless the train approaching would stop at that place. The ticket he purchased contained these words, "For this day and train only." It was *held*,

1. That a fixed custom by the agent of a railroad company would not prevail over the published notices and time-tables of such company, of which the plaintiff is presumed to have knowledge, unless the evidence showed that the custom was so prevalent that every one is supposed to know of its existence and to act with reference to it; that evidence by plaintiff and his witness to the effect that they have individually assumed the custom to exist, and acted upon it, though they have not tested or heard of it from others, is legally insufficient to establish it.

2. That the ticket marked as above stated does not of itself, in the absence of express representations to that effect by an agent of the company, imply a contract by it to carry such passenger to that station by that particular train when the posters and time-tables of the company showed that the train did not stop there, and by the custom of the company the ticket is good for any train on that day, or till used.

APPEAL from Circuit Court, Cecil county.

Action for damages. Judgment for defendant. Plaintiff appeals.

Albert Constable and *Henry W. Archer* for appellant.

W. J. Jones and *Alexander Evans* for appellee.

IRVING, J.—The appellant purchased of the appellee, a railroad transporting passengers for reward, a ticket from Elkton to Stanton, when a train was approaching, and going toward Stanton. He boarded that train, and found that, by the company's regulations, that train could not and would not stop at Stanton; so that he was required either to stop at Newark, and wait for a train which would stop at Stanton, or to pay the additional fare of ten cents for the distance from Stanton to Newport, a station beyond Stanton, at which the train he boarded did stop, and then walk back to Stanton, a distance of about three miles. He chose to do neither, but stopped at Newark, and finished his journey to Stanton on foot, and has sued the railroad company for selling him a ticket by a train which, he claims, was represented to him as then about to proceed from Elkton to Stanton, "to deliver passengers at the latter station." He does not claim, nor attempt to prove, that the ticket agent, or any officer of the company or train, expressly represented to him, either voluntarily or in response to inquiry from him, or other person in his presence, that the train then approaching, and which he took, was his right train, and would stop at Stanton. If he had so proved, a very different question would have been presented, and one of more seriousness, upon which we design hereby to intimate no opinion. He made no inquiry; but he claims the sale of the ticket, when a train was approaching, was a representation that the train then coming would stop at Stanton, and he endeavors to sustain this position by evidence which he contends establishes such a custom on the part of the agent in selling tickets as did deceive him into supposing he could go to Stanton by the train which he boarded, and justified him in so attempting. The Circuit Court did not think the evidence legally sufficient to warrant a verdict for the plaintiff, and accordingly so instructed the jury; and, the verdict and judgment being for the defendant, the plaintiff appealed. We fully agree with the Circuit Court, and think there was no error in taking the case from the jury.

FACTS.

It is well-settled law that railroad companies, from the nature and necessities of their business, must have the power to make reasonable rules and regulations as to the manner of performing their duties as public carriers; that is to say, as to the hour and schedule time for starting and running their trains, and as to the places on the route at which particular trains shall stop in transit. Schedule posters, informing the public of the time of departure from particular places, and the destination of the several trains, are placed in the ticket offices, station-houses, and public places, in view of the public; and time-tables are always on hand for distribution, that passengers may be well informed of the hour at which, and train by which, they may reach any desired destination on the line

RAILWAY REGULATIONS—PASSENGERS MUST INFORM THEMSELVES AS TO TRAINS.

of the road. Being thus informed, or afforded the means of information, persons desiring tickets of travel are expected to inform themselves as to the train they wish and must take for their destination; and, if they do not understand or see the notices, it is their duty in law to inquire and learn what train they should take to reach the point they wish; and if a mistake is made, not induced by the railroad company, against which ordinary diligence as to inquiry would have protected, no redress against the company will be accorded. Numerous authorities may be cited for the principles we have laid down, to some of which we refer. Thomp. Carr. 66; Fink *v.* Albany R. Co., 4 Lans. 147; Johnson *v.* Railroad Co., 46 N. H. 220; Dietrick *v.* Pennsylvania R. Co., 71 Pa. St. 432, 436; Ohio & M. R. Co. *v.* Applewhite, 52 Ind. 540; Chicago & A. R. Co. *v.* Randolph, 53 Ill. 514; Logan *v.* Hannibal & St. J. R. Co., 77 Mo. 663.

In the present case it is admitted that a large, printed schedule of the trains, and their time of respective departure from Elkton, and where they would severally stop, was conspicuously posted in the Elkton ticket office, where the appellant purchased his ticket. By that poster it appears, as it does also by other evidence, that there were five trains which left Elkton, at that time, daily, going northward, four of which stopped at Stanton, where the appellant wanted to go, and only one of those trains did not stop at Stanton; and that was the one appellant selected for his trip and boarded. The appellant lays his mistake, and consequent disappointment, at the door of the appellee, and bases his claim for damages on the contention that he took the train he did because of the conduct of the agent in selling him a ticket as the train was about to arrive, which act of the agent, according to his understanding of the agent's custom, amounted to a representation to him that that train would stop at Stanton.

A custom or usage which will control the interpretation of a contract must be one which is of such general acceptance and prevalence in a community that all contracts are presumed to have been made with the knowledge of and with reference to such custom or usage. Anson, Cont. 244, 245; Johnson *v.* Railroad Co., 46 N. H. 220, 221; Foley *v.* Mason, 6 Md. 48. Whether, therefore, this be a suit for violation of a contract by the company, or for misrepresentation, it is clear that the custom or usage relied on for recovery must be one which would bind the company either for the construction of the contract in the ticket, or to make the company answerable for the statements of its ticket agent. If the practice of a ticket agent can be shown to control a contract for carriage on the road, and make that custom or usage of the agent prevail over the published notices and schedule of the company, and the regulations thereof, of which the passenger is ordinarily presumed to have knowledge,

CUSTOM RELIED ON—WHAT SUFFICIENT TO BIND COMPANY.

as the law makes it his duty to inquire (which we do not decide), it is very clear that the evidence in this case was not legally sufficient to establish such usage as would bind the company, and release the passenger from the obligation to inquire and inform himself. A custom or usage in the law is something which exists in general repute. It is so prevalent that every one is supposed to know its existence, and is presumed to act and contract with reference to it.

The plaintiff testifies it was the custom of the ticket agent to raise the window ten or fifteen minutes before a train would arrive, and to sell tickets for that train only, and for places only at which that train would stop, but he says his knowledge was based wholly on his experience, and what he had seen in the ticket office. He had never asked about it, or even heard anybody say there was such custom. He had never asked for a ticket to any place and been refused, nor had he known anybody else to ask for one for any train, and be refused a ticket by the agent. His testimony, therefore, only shows what he thought was the usage, from what he had seen done, and had happened not to see done. He had no other knowledge, and therefore his testimony cannot tend in the slightest degree to establish a controlling custom. He was certainly not influenced by anything except what he had seen, and therefore thought it safe to do. Notwithstanding he did not in fact know of a prevailing custom, yet, if such custom in truth existed, it may be contended that he would be conclusively presumed to know of it, and it would consequently control his contract. We find no evidence of such custom legally sufficient to establish such legal usage, or even, in our opinion, tending that way. With one view, all the plaintiff's witnesses say they never knew of anybody asking for a ticket to any place, at any time when tickets were being sold, and being refused. Beyond their own personal observation they have no knowledge of a custom of any kind in and about the matter. Mackaray, the main witness for the appellant, describes the ticket agent's habit of raising the window of the office for the sale of tickets as a train was approaching, and about 10 minutes before its arrival, in the same way as the appellant did; and his opinion of the agent's habits in the sale of tickets was solely based on what he had done and seen done. He bought to the station he wanted to reach, and says he usually knew where the train he wanted was going. He said he would not ask for a ticket if he did not know a particular train would stop at the station he wanted to reach; and, if he did not know, he would inquire. He therefore did not know of an invariable custom which did away with the necessity of inquiring. He testifies, therefore, to nothing but personal observation of the habit of that agent. The other witnesses, three in number, confine their knowledge as derived wholly from experience. They had never applied for a ticket for a train other than the one approaching, and been refused it, nor had they known of

any one else doing so and being refused. In fine, they had never heard anything at all about it. This analysis of the appellant's testimony and proof shows conclusively that there was nothing offered which could possibly justify a jury in finding a fixed custom on the part of the agent so generally known and understood that even the railroad company would be affected with knowledge of it and would be bound by it.

But it is contended that the defendant's witness, the ticket agent, gave testimony from which a jury might find such controlling custom. We do not think so. Whatever obscurity there may be in his statements of his habit in that regard, or even inconsistency in his statements, he does say expressly that whenever the office was open he sold tickets for any train, and that persons often bought tickets to be used days ahead. He certainly says nothing which tends to establish a custom which would bind the company.

Finally, it was contended that, the ticket being marked "For this day and train only," this was of itself a representation. Clearly it was not. Had it been marked "Good for train No. 26 only," which train he took, the contention would be plausible; but it was not so marked. Being a first-class ticket, the evidence is all one way—that it was good till used; and, if it were not, it was good for that whole day, and any train going to Stanton that day, so that he could have taken another train. The ticket's statement could certainly not deceive.

As, in our opinion, the evidence offered, under no state of the pleading, would be legally sufficient to warrant a finding for the plaintiff, we have not found it necessary to consider the questions raised by demurrer.

Right of Passenger to take Passage on Particular Train.—See Paulitsch v. New York, etc., R. Co., 26 Am. & Eng. R. R. Cas. 162.

LOUISVILLE, NEW ALBANY AND CHICAGO R. CO.

v.

THOMPSON, Adm'r.

(*Advance Case, Indiana. June* 17, 1886.)

The plaintiff's intestate was killed by the falling of the train on which he was riding, caused by the giving way of a bridge. There was reasonable time and opportunity to provide against the consequences of the flood after knowledge of the flood by the company. A pass issued to another person was found in his pocket after his death. On the trial it was contended that

the finding of such pass raised an inference that the deceased was wrongfully on the train. *Held*,

1. That as the passenger had been carried for a considerable distance on the defendant's train, the presumption is that he was lawfully on the train, and will overcome any inference that the passenger was wrongfully on the train which might be raised by the finding of such pass on his person.

2. That the degree of practical care and skill which is required of railroad companies in the carriage of passengers extends to the road-bed, bridges, track and machinery.

3. That the duty of making inspection, and warning approaching trains if the inspection reveals an unsafe condition of the structure, rests upon the company, and it is liable to a passenger who suffers an injury for such breach of duty.

4. That it must appear that the negligence was the proximate cause of the injury, and as the evidence showed that the plaintiff was lawfully on the train of the carrier, and that he was injured while on the train, the presumption is that the injury was caused by the negligence of the carrier.

APPEAL from Washington Circuit Court.
Alspaugh & Lawler for appellant.
Zaring, Voyles & Morris for appellee.

ELLIOTT, J.—The complaint of the appellee seeks a recovery for the death of Andrew Eichler, which is alleged to have been caused by the negligence of the appellant. It is charged that the appellee's intestate was a passenger on one of the appellant's trains; that, because of the negligence of the appellant in constructing and maintaining a bridge across Blue River, the train went down into the river, and Andrew Eichler was killed. We agree with appellant's counsel that it must appear from the complaint that the death resulted from the negligent acts charged; for we understand it to be settled law that it must be shown that the negligence was the proximate cause of the injury. Pennsylvania Co. *v.* Hensil, 70 Ind. 569; City *v.* Martin, 74 Ind. 449; Pennsylvania Co. *v.* Gallentine, 77 Ind. 322; Cincinnati, etc., Co. *v.* Hiltzhauer, 99 Ind. 486, see page 488; Pittsburgh, etc., Co. *v.* Conn, 104 Ind. 64. While we agree with counsel as to the general rule of law, we cannot concur with them as to the construction of the complaint; for, in our opinion, the complaint, although somewhat obscure, does charge that appellant's negligence was the proximate cause of the death of Andrew Eichler.

NEGLIGENCE MUST BE PROXIMATE CAUSE OF INJURY.

The widow of the intestate was permitted to testify, but as all that is material in her testimony relates to matters subsequent to her husband's death, or else to matters which were open to the knowledge of all persons who knew the parties, no error was committed, even if it were conceded that she was not competent to testify generally as to matters that occurred prior to his death. Lamb *v.* Lamb, 105 Ind. 456; Floyd *v.* Miller, 61 Ind. 225.

In the pocket of the appellee's intestate was found a pass, reading thus:

"LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY. TRIP PASS, No. 911.

"LOUISVILLE, KY., December 22, 1883.

"Pass J. M. Whaling from Louisville to Chicago. Why issued: Acc't C., M. & St. P. Ry. Good in one direction only, unless accompanied by a coupon. Good for one trip only, until February 22, 1884, when countersigned by

PASS FOUND ON INTESTATE.

"D. F. JENNINGS, Gen'l Freight Ag't.

"E. B. STAHLMAN, 2nd Vice-pres.

"Accepted subject to conditions on back hereof."

Indorsed on back:

"Not good on freight trains. Not transferable. The person accepting and using this pass thereby assumes all risk of accident and damage to person or property. If presented by any other than the individual named hereon, the conductor will take up the pass, and collect full fare.

"LOUISVILLE, NEW ALBANY & CHICAGO R. Co.

"December 22, 1883, Chicago.

"(Void after December 31, 1883.

[Countersigned] "D. F. JENNINGS.)"

There was also found in his pocket a conductor's check and about $20 in money. These things were found by the coroner after Eichler's body was recovered from the river into which it had been carried by the fall of the bridge. No explanation was given by either party as to the manner in which Eichler came into possession of the pass, nor as to the circumstances under which it was issued, nor as to who J. M. Whaling was, or where he lived.

The conductor of the train on which Eichler took passage, after stating that the train left Chicago for Louisville on the evening of the twenty-third of December, testified that: "I went through it, taking up tickets, coupons, and passes, and collecting fares. This pass was handed to me by a man on the train that night at Chicago. I took a portion of the pass—the top part of it—and gave the pass back to the man who handed it to me. I do not know what became of the coupon. I turned it over to the auditor of the company. I did not know either Eichler or Whaling. If I had known it to be Eichler instead of Whaling, I would have taken up the pass and collected his fare. The man who gave me this pass paid me no money, and gave me no ticket for his fare."

We accept as good law the doctrine of the decided cases, that one who fraudulently attempts to ride on a non-transferable pass,

issued to another person, is not a passenger to whom the carrier owes a duty to carry safely. A person who enters a train on a pass to which he has no right, cannot, therefore, maintain an action for injuries caused by the carrier's negligence. Chicago, etc., Co. *v.* Michie, 83 Ill. 427; Toledo, etc., Co. *v.* Brooks, 81 Ill. 245; Toledo, etc., Co. *v.* Beggs, 85 Ill. 80; Brown *v.* Missouri, etc., Co., 64 Mo. 536. This rule is founded on sound principle, since it is a fundamental doctrine of the law that one who is guilty of a fraud cannot enforce any rights arising out of his own wrong. It is also in close agreement with the rule that a carrier owes no duty to an intruder. Indianapolis, etc., Co. *v.* Pitzer, 6 N. E. Rep. 310 (November term).

PERSON FRAUDULENTLY RIDING ON PASS NOT PASSENGER.

The difficult question is whether the evidence can be justly said to prove that Eichler was attempting to fraudulently use the pass issued to Whaling. There is, as we have intimated, no evidence that he procured the pass fraudulently, or was attempting to travel on it, except such as is supplied by the fact that after his death the pass was found in his pocket. For anything that appears, he may have been the mere custodian of it for Whaling. The presumption always is in favor of honesty and fair dealing, and he who asserts the contrary must prove it. A presumption, like a *prima facie* case, remains available to the party in whose favor it arises until overcome by countervailing evidence. Bates *v.* Pricket, 5 Ind. 22; Adams *v.* Slate, 87 Ind. 573, see page 575; Cleveland, etc., Co. *v.* Newell, 104 Ind. 264. The presumption in favor of Eichler's good faith and honesty was not overcome. It cannot, indeed, be justly said that there was any evidence impugning it, for the conductor's testimony does not show that Eichler did not pay his full fare, nor does it show that he was fraudulently in possession of the pass issued to Whaling. There are many ways in which he may have honestly and fairly obtained possession of the pass. It may have been intrusted to him by Whaling, or he may have found it. We cannot consent to characterize an act as fraudulent from the single fact that on a dead man's body is found a pass issued to another person. If there were attendant circumstances making it probable that the pass had been wrongfully used, the case would be different; but here there are no such facts, for the conductor says that he did not know the man who presented the pass. It seems much more reasonable that the appellant, who issued the pass, should explain why and to whom it was issued, and secure the testimony of the man to whom it was given, or else show what had become of him, than to presume from the fact that it was found in a dead man's pocket that it had been dishonestly obtained, or fraudulently used. The appellant had the coupon in its possession, and if it was true that it had been

NO PRESUMPTION THAT DECEASED WAS FRAUDULENTLY TRYING TO USE PASS.

dishonestly used, it could have produced it, and given some evidence, at least, to prove that fact.

It is said by counsel that "after the wreck the conductor accounted for all the passengers by the tickets, papers and coupons taken up; that his report showed eight persons to be missing; among them the man supposed to be J. M. Whaling." The testimony of the conductor is that "eight persons were missing; among them was the man I supposed to be J. M. Whaling." We have carefully searched the record to ascertain, if possible, how many bodies were recovered, but we can find no evidence showing that more than two were recovered. We find evidence proving that Blue River was very high; that the body of Eichler was swept about two miles downstream, and the fair presumption is that Whaling's body was not recovered. This leads to the further presumption, since it is the one consistent with good faith and honesty on the part of Eichler, that Whaling was on the train; and had himself used the pass. Nor is there anything unnatural or unreasonable in this inference, for it is not at all improbable that Whaling may have intrusted his pass to Eichler for safekeeping. It is perfectly reasonable to infer that, if Whaling was on the train, he himself used his pass. Any other inference would be a strained and unnatural one. At all events, this inference is the one that best comports with the theory of honesty and good faith, and the jury did not do wrong in adopting it; for any other theory would require the presumption that Eichler had stolen the pass, or that both he and Whaling were guilty of fraud.

The inference—for it cannot, with justice or accuracy, be called a "presumption"—arising from the fact of finding the pass in Eichler's pocket after his death, is a special one, while the presumption of good faith is a general one. The court may instruct the jury that the presumption is in favor of good faith and honesty; but it could not rightfully instruct, as matter of law, that the fact that the pass was found in Eichler's pocket created a presumption that it was fraudulently used, and this proves that the inference must give way before the general legal presumption. But if we grant that the fact that the pass was found in Eichler's pocket creates a presumption, and that there is a conflict of presumptions, still the one in favor of good faith is the stronger, and will break down the other. In Potter *v.* Titcomb, 7 Me. 309, there was a conflict of presumptions, and it was held that a presumption in favor of good faith would outweigh a presumption of payment. Where a party is found in possession of a document, the presumption is that he came by it fairly. Hazen *v.* Henry, 6 Ark. 86. The general principle runs through all the law, that, where the facts of a case are consistent with both honesty and dishonesty, the courts will adopt the construction which is in favor of honesty. Greenwood *v.* Lowe, 7 La Ann. 197; Bradish *v.* Bliss,

35 Vt. 326. It cannot, therefore, be justly held that the jury erred in acting upon the general presumption in favor of honesty and good faith, since a presumption, until overcome, makes a *prima facie* case.

The complaint, with great, and perhaps unnecessary, particularity, describes the negligence which it is alleged caused the death of Eichler, and it is contended that the evidence fails to prove the specific acts of negligence charged. We do not think the doctrine that matters of description must be strictly and fully proved applies to the allegations of negligence in actions against carriers to recover for injuries resulting from negligence. In such cases it is sufficient if the substance of the issue is proved. It is sufficient to prove the substance of the issue as to the payment of fare, without proving specifically that it was paid in the precise manner and form alleged. The important question is as to the payment of fare as demanded by the carrier, and not as to the character of the payment. But, in this instance there was evidence fully warranting the inference that the appellee's intestate had paid his fare in the manner and form described in the complaint. The conductor had recognized him as a passenger, and had given him a check, indicating that he was a passenger, and he had been carried for many hours and many miles as a passenger.

NEGLIGENCE CAUSING DEATH —EVIDENCE CONCERNING.

The authorities go further than we need do in this case; for, as stated by an author of a standard work upon carriers: "Every person being carried upon a public conveyance usually employed in the carriage of passengers is presumed to be lawfully upon it as a passenger. Hutch. Carr. § 554. Another author says: "It is said that payment of fare will be presumed to have been made according to the common course of business upon the route; and, although this has been questioned, it is certain that such an inference, as matter of fact, will be very obvious in the case of passengers upon railway trains, and we do not perceive any reasonable objection to the rule as one of presumption of fact, which, for its force, must depend upon circumstances to be judged of by the jury." Redf. Carr. § 134. The skill and care required of railway carriers of passengers, as is well known, is very great. They are required, as this court has said, to exercise the "highest degree of care to secure the safety of passengers, and are responsible for the slightest neglect, if any injury is caused thereby." Jeffersonville, etc., Co. *v.* Hendricks, 26 Ind. 228. This doctrine has often found approval in our decisions, and has often been stated by other courts in much stronger terms. Louisville, etc., Co. *v.* Kelly, 92 Ind. 371; s. c., 13 Am. & Eng. R. R. Cas. 1; Terre Haute, etc., Co. *v.* Buck, 96 Ind. 346; s. c. 18 Am. & Eng. R. R. Cas. 234; see page 356.

PERSON LAWFULLY IN CONVEYANCE PRESUMED TO BE PASSENGER —DEGREE OF CARE REQUIRED OF CARRIER.

This principle, as the decided cases with much harmony affirm,

applies to the machinery, track, and bridges of the railway. Bedford, etc., Co. *v.* Rainbolt, 99 Ind. 551; s. c. 21 Am. & Eng. R. R. Cas. 466; Cleveland, etc., Co. *v.* Newell, 104 Ind. 264. But while the degree of care and skill required is very great, still the carrier is not an insurer of the safety of the passenger, and is not answerable for injuries resulting from an occurrence against which human foresight and prudence cannot guard. If the accident is one which human care and skill could not foresee or guard against, there is no liability. Where, however, a passenger, rightfully on the train, is injured by the breaking down of a bridge, the presumption is that the carrier was guilty of negligence. This settled rule proceeds upon the theory that it is within the power of the carrier, and not within that of the passenger, to fully show the cause of the injury. Pittsburgh, etc., Co. *v.* Williams, 74 Ind. 462; Memphis, etc., Co. *v.* McCool, 83 Ind. 392; Terre Haute, etc., Co. *v.* Buck, *supra*, see page 358; Bedford, etc., Co., Rainbolt, *supra*.

NEGLIGENCE IN MAINTENANCE OF BRIDGE—PROVISION AGAINST FLOOD—AUTHORITIES.

Applying to the case before us these settled principles, we do not think it can be said that the verdict is not supported by the evidence, upon the question as to the manner in which the bridge was constructed and maintained; for there is evidence that there was negligence in this respect on the part of the appellant, and we cannot say that either the presumption which the law creates in favor of the appellee, or the testimony adduced by him, was overcome by the evidence introduced by the appellant. Where a bridge is weakened by a sudden and unprecedented flood, and there is no time or opportunity for inspecting it, and ascertaining its condition, the railway carrier is not responsible for an injury resulting from its giving way beneath a train run with proper care and skill. If it is apparent to those in charge of a train that the track and bridges have been made unsafe by tempests or floods, the trains must be run with a care proportioned to the known danger. If there is time and opportunity for inspecting and discovering the unsafe condition of a bridge after a great flood, and care and prudence require such an inspection, then the duty of making it, and of warning approaching trains, if the inspection reveals the unsafe condition of the structure, rests upon the railway company. The duty of the company is to employ the highest degree of practical care to guard against accidents, and where its agents or officers have knowledge that a great storm or a great flood has probably made its track or bridges unsafe, it must, where there is reasonable time and opportunity, take measures to protect its passengers from injury. Whart. Neg. 634; 2 Redf. Rys. § 192; Hardy *v.* North Carolina, etc., Co., 76 N. C. 5; Great Western R. Co. *v.* Moore, P. C. (N. S.) 101; Railroad Co. *v.* Halloren, 53 Tex. 46.

The rule declared in such cases as Pittsburgh, etc., Co. *v.* Gilleland, 56 Pa. St. 445; Flori *v.* City, 69 Mo. 341, and Livezey *v.* Philadelphia, 64 Pa. St. 106, does not apply to an action by a passenger against the carrier; for in those cases the relation of carrier and passenger did not exist, and the rule is that a railway carrier owes a much higher duty to passengers than to landowners along the line of its road.

The case of Ellet *v.* St. Louis, etc., 76 Mo. 518, is not in conflict with the views we have expressed. On the contrary, it is in harmony with them; for it was there said: "It is quite apparent from the foregoing statement of facts that the death of Ellet resulted from a sudden and unknown weakening of the track of the defendant by an extraordinary and unprecedented rainstorm."

The decision in Nashville, etc., Co. *v.* David, 6 Heisk. 261, can hardly be considered as in point, as the rule respecting carriers of goods is more strict than that governing carriers of passengers, although the language there used applies here; but its application is against the appellant, for it was said: "The true rule should have been stated to be that if the parties had any reason, in the situation the company occupied, to anticipate that such a flood was about to occur, then it was the duty of the company to use, actively and energetically, all means at its command, or that might be reasonably expected of a company engaged in their business, to meet the emergency." The cases cited by appellants are therefore far from maintaining that carriers are exculpated from liability in cases where there is reasonable time and opportunity to guard against the results of an extraordinary flood, and proper care and skill is not exercised.

In the case before us it cannot be said that there is no evidence that the appellant was negligent in omitting to take proper precautions to discover the unsafe condition of the bridge, and warn the train in which the appellee's intestate was a passenger. It appears in evidence that farmers in the vicinity, hours before the accident, had knowledge, from the indications about them, of the probability of a great flood. Some of them remained up all night to guard against it; and some of the agents of the appellant were not far distant from the bridge, and might, it is fairly inferable from the evidence, have discovered its unsafe condition, and given warning to approaching trains; for the evidence shows that the bridge was unsafe hours before the train reached it. Nor can we say that the evidence does not justly warrant the inference that those in charge of the train were informed by the appearance of the water about the bridge that it was unsafe, and that, notwithstanding this information, they took the train upon it at a dangerous and improper speed.

Thus far, in following the line of counsel's argument, we have

tacitly conceded that the bridge was safe as against an ordinary flood; but this concession cannot be justly made, as there is evidence strongly tending to prove that the bridge was not so constructed as to resist even usual floods. The evidence shows that the bridge was sometimes covered with water in times of freshet, and such a bridge cannot, as matter of law, be pronounced a safe one; nor can it be said that the increased volume of water caused the bridge to give way, for the evidence fully warrants the conclusion that freshets no greater than those which had formerly swelled the river beyond its banks would have made it unsafe. We cannot, therefore, assume, in the face of the verdict, that the bridge was sufficient, as against ordinary floods, nor can we assume that the increase in the height of the water caused the bridge to weaken and give way. The evidence does not justify us in disregarding the finding of the jury upon this point; for, so far is it from having this effect, that it inclines us strongly to the opinion that the jury's conclusion upon this point was the only correct one. To the assistance of the evidence arises the presumption, of which we have already spoken, that the accident was due to the negligence of the carrier. In a case very like the present the jury were instructed that "where a passenger is injured by any accident arising from a collision or defect of machinery, he is required, in the first place, to prove no more than the fact of the accident, and the extent of his injury; that a *prima facie* case is thus made out, and the *onus* is cast upon the carrier to disprove negligence; that, in the case trying, the legal presumption was that the injuries to the plaintiff were caused by the negligence of the defendant; and that this presumption continued until a countervailing presumption of fact was established." In commenting upon the instructions it was said: "Now, we must say, the able argument of the learned counsel to the contrary notwithstanding, that a better summary of the law governing cases of this kind could scarcely have been framed." Philadelphia, etc., Co. *v.* Anderson, 94 Pa. St. 351. It was said in another case: "Nay, the mere happening of an injurious accident raises *prima facie* presumption of neglect, and throws upon the carriers the *onus* of showing that it did not exist." Liang *v.* Colder, 8 Pa. St. 479. In the case of Delaware, etc., Co. *v.* Napheys, 90 Pa. St. 135, the court said: "A *prima facie* case of negligence is thus made, and the *onus* is cast upon the carrier to disprove negligence." This presumption, combined with the facts developed by the evidence, gives the verdict of the jury upon the point under immediate discussion fair support, and a long and firmly settled rule forbids us from disturbing it.

BRIDGE NOT SAFE AGAINST ORDINARY FLOOD.

Some minor questions require consideration. One of these grows out of the exclusion of the testimony of John C. Lawler. Mr. Lawler did testify as a witness, and as the specification in the

motion for a new trial is the general one that the court erred in excluding his evidence, no question is presented for our consideration. A general specification is not sufficient; the particular testimony excluded must be specified with reasonable certainty. McClain *v.* Jessup, 76 Ind. 120; Marsh *v.* Terrell, 63 Ind. 363; Coryell *v.* Stone, 62 Ind. 307; Grant *v.* Westfall, 57 Ind. 124; Ball *v.* Balfe, 41 Ind. 224.

Our cases recognize the doctrine that where there is no evidence upon a point covered by a special interrogatory propounded to the jury, they may so answer. Maxwell *v.* Boyne, 36 Ind. 120; Gulick *v.* Connely, 42 Ind. 134; Rowell *v.* Klein, 44 Ind. 290; Mitchell *v.* Robinson, 80 Ind. 281; Williamson *v.* Yingling, id. 379. Under this rule the answers to all the material interrogatories were proper. The third interrogatory is, "What did the deceased represent his name to be to said conductor?" and the answer was, "No evidence." Of this counsel say: "An inspection of the record will show this answer to be evasive and untrue—a mere subterfuge." We have carefully studied the record, and cannot find that there is evidence that any representation whatever was made to the conductor; for we do not believe that the mere fact that the pass issued to Whaling was found in Eichler's pocket can be deemed evidence that he made any representation to the conductor. The fourth interrogatory is: "Was the conductor deceived by such representation?" If no representation was made, we cannot perceive that the jury did wrong in answering that there was no evidence upon that point. What we have said of these two interrogatories applies to the fifth, for it rests upon the same assumption that they do. The answer to the sixth interrogatory is perhaps wrong; for, according to the answer to the first, the answer should have been, "No;" but the error of the jury in this particular could not possibly have injured the appellant. Where there is no material error, there can be no reversal. The answers to all the other interrogatories were proper, and the appellant had no cause to complain of them.

SPECIAL INTERROGATORY—NO EVIDENCE ON POINT.

The truth or falsity of answers to interrogatories is not presented by a motion to compel the jury to make them more specific, nor is it presented by a motion for a *venire de novo*. It is obvious that the court cannot direct the jury how they shall decide disputed questions of fact. Judgment affirmed.

See Annes *v.* Milwaukee, etc., R. Co., and note, *post*, p. 102.

EVERETT

v.

CHICAGO, ROCK ISLAND AND PACIFIC R. CO.

(*Advance case, Iowa. June* 9, 1887.)

Under the Iowa Code (Miller's Code, 347), it is provided that "a charge of ten cents may be added to the fare of any passenger where the same is paid upon the cars, if a ticket might have been procured within a reasonable time before the departure of the train." The plaintiff neglected to apply for a ticket until just before the incoming train came to a full stop, when he found the ticket office closed. The ticket agent was in the office, for the purpose of selling tickets, until the train arrived opposite the depot. Failing to procure a ticket he entered the train without one and was ejected by the conductor for refusing to pay the extra fare demanded. In an action to recover damages, it was *held*, that the language of the Code, "before the departure of the train" does not require that the office shall remain open up to the very instant the train moves off. That the question, what is a reasonable time for the procuring of tickets before the departure of trains from a station depends principally on the requirements, convenience and demands of the public at that particular station.

APPEAL from Pottawatamie District Court.

On the morning of August 18, 1881, the plaintiff took passage on defendant's railroad at a small station named Weston, intending to travel to Council Bluffs, a distance of ten miles. He did not procure a passenger ticket, and the conductor of the train demanded ten cents in addition to the ticket rate, which the plaintiff refused to pay. Thereupon the conductor caused the train to be stopped, and he forcibly ejected the plaintiff therefrom. This action was brought to recover damages for the alleged wrongful act of the conductor in removing the plaintiff from the train. A trial by jury resulted in a verdict and judgment for the defendant. Plaintiff appeals.

Sapp & Pusey for appellant.

Wright, Cummins & Wright and *Wright, Baldwin & Haldane* for appellee.

ROTHROCK, J.—1. It is provided by section 2 of chapter 68 of the Laws of 1874 (Miller's Code, 347) that "a charge of ten cents may be added to the fare of any passenger, where the same is paid upon the cars, if a ticket might have been procured within a reasonable time before the departure of the train." The ground upon which the plaintiff based his refusal to pay the ten cents demanded by the conductor was that he was prevented from

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procuring a ticket because the ticket office was closed when he presented himself for the purpose of purchasing a ticket. The facts are that the plaintiff is the owner of a large farm some five miles from Weston. His residence is at Council Bluffs, and he made frequent visits to his farm, going by rail by the way of Weston. He knew that the defendant was authorized to collect ten cents, in addition to the ticket rate, from passengers who neglected to purchase tickets at the station. Weston is a small and unimportant station at which an inconsiderable amount of business is done by the railroad company, either in freight or passenger traffic. As is usual at such places, the company keeps no assistant for the agent; and, when a train arrives, the agent leaves the ticket office, and goes upon the platform of the station to transact his business with the train; such as seeing to the loading of the mail on the train, the receipt and delivery of baggage and express packages, and the like. The plaintiff came in from his farm in the morning, and stopped at a store in the village until he heard the whistle of the train as it approached the station, when he went to the station, and arrived there just before the train came to a full stop. The ticket agent had the office open for a considerable time before the train arrived, and sold tickets to passengers, and he did not leave the office until the engine to which the train was attached had passed the office window, when he went on the platform to attend to his train duties. The train stops at that station only long enough to do the train business and allow passengers to get on and off the cars.

The court permitted all these facts to be shown to the jury, and charged the jury to the effect that if, under all these facts and circumstances, a reasonable time was given to passengers to purchase tickets before the departure of the train, the conductor was authorized to demand the extra ten cents of the plaintiff. One of the instructions to the jury was as follows: CHARGE TO JURY.

"(6) The fact, if it is a fact, that the plaintiff applied at the defendant's ticket office at Weston to purchase a ticket at a time when it was closed, does not of itself alone necessarily show that opportunity was not given within a reasonable time before the departure of the train for the purchase of tickets; nor can it be said, as matter of law, that the defendant had a right to close its ticket office as soon as the train arrived at the station. The question, what is a reasonable time for the procuring of tickets before the departure of trains from a station? depends principally on the requirements, convenience, and demands of the public at that particular station. It was the duty of the defendant to keep its ticket office open, and to keep a competent man there to sell tickets at such times as would reasonably, fairly, and fully accommodate the public in the matter of procuring tickets. Regard should be had to the importance of the station, and the number of people who

have occasion to purchase tickets there; and the ticket office should be kept open at such times as people in general who travel by rail are in the habit of repairing, and find it convenient to repair, to the station to purchase tickets and get aboard the train."

Counsel for appellant insist that this and other instructions given by the court to the jury are erroneous. They claim that, under a proper construction of the statute above cited, it was the duty of the railroad company to keep its ticket office open up to the time of the departure of the train; in other words, they claim that by the very terms of the statute the office must be kept open for the sale of tickets just so long as it is possible for passengers to purchase tickets, and board the train. Assuming this to be the meaning and intent of the statute, they contend that it was error for the court to submit to the jury the question whether, under the facts, the office was kept open a reasonable time in which passengers might procure tickets. We do not think this position is sound. In our opinion, it was proper to allow the defendant to introduce evidence of the character of the station, whether the facilities extended to the travelling public to purchase tickets were such as were required for the convenience of the public. It would be a most unreasonable requirement to impose upon the defendant the burden of employing two persons to attend to the station in order that the ticket office may be kept open for the one or two minutes which a train is required to stop at such a station, in order to accommodate the exceptional cases of passengers who may for any reason arrive at the station after the arrival of the train. Regard must be had to the orderly transactions of the business of the station, taking into consideration the necessary and proper facilities extended to persons having occasion to travel on the trains or transact other business with the company. It is absolutely necessary that the office should be open for business a sufficient time before the departure of the train, in order to enable passengers to procure their tickets, receive and count their change, if any, and prepare to board the train, without unnecessary interference with each other. But the language "before the departure of the train" does not require that the office shall remain open up to the instant the train moves off. The question is, might the passenger have procured a ticket within a reasonable time before the departure, and not up the very moment when the wheels began to move?

DUTY TO KEEP OFFICE OPEN UP TO TIME OF DEPARTURE OF TRAIN—REASONABLE TIME.

2. Some complaint is made as to the place where the plaintiff was ejected from the cars. It appears that it was half a mile from a public crossing. It is not required in this State that, where a person may rightfully be ejected from a railroad train, it must be done at a station or public crossing. Brown *v.* Railroad Co., 51 Iowa, 235. In the case at bar all of the facts attending the removal of the plaintiff from the train, and the place

PLACE OF EJECTING PLAINTIFF.

where he was removed, were fairly submitted to the jury on what we regard as proper instructions; and the jury, in answer to a special interrogatory, found that the conductor did not act with malice, express or implied, towards plaintiff in ejecting him from the train. We think this finding was fully supported by the evidence.

3. The plaintiff offered to introduce evidence to the effect that the defendant's station was an unfit place for passengers to remain in waiting for trains because of the close proximity of privy. The evidence was excluded, and plaintiff's counsel complain of this ruling of the court. We think it was correct. The plaintiff did not allege this as a reason why he did not go to the station and procure a ticket, and he made no such claim to the conductor. His sole ground of recovery was based upon the alleged fact that he could not procure a ticket because the office was closed.

We think the judgment of the district court should be affirmed.

What is Reasonable Time for Procuring Tickets before Departure of Trains.—It is a well settled rule that in order for railway companies to enforce a rule for the collection of additional fare when tickets are not purchased they are required to keep open their offices for the sale of tickets to passengers for a reasonable time before the departure of each train. A reasonable time has been held to mean up to the time fixed by the published rules for the departure of the train, and not up to the time of actual departure. St. Louis, etc., R. Co. *v.* South, 43 Ill. 176. In that case the court say: "We do not recognize any right in any person to apply at a railroad ticket office after the time fixed and published for the departure of a train, and demand the same rights and privileges accorded to those who come at the proper time for their tickets. It is well-known that trains are sometimes delayed for hours, and that it is unavoidable. Would it not be going too far to require the companies controlling them to keep an agent at his post during all this delayed time? Tickets are not usually applied for by passengers after the time fixed for the departure of a train. The companies have a right to presume they will not be applied for after that time, and therefore their ticket agents can close their ticket office and go about their other business."

The same construction was adopted in the case of Swan *v.* Manchester & L. R. Co., 132 Mass. 116. In that case the ticket seller was in his office until the time advertised for the departure of the train. He left it after that time, and while the train was approaching, in order to aid the station agent, as he was accustomed to do, in loading the baggage upon the train. The plaintiff did not approach the ticket office to find it vacant until after the time had expired for the departure of the train as advertised. There was sufficient time for him to have procured his ticket before the train actually started from the station, if the ticket seller had then been in the office. The court *held* the company was not liable for expelling the passenger for refusing to pay the extra fare demanded of passengers not provided with tickets, and say: "Delays must necessarily from time to time arise in the progress of a train from a variety of incidental circumstances, but at the station everything may be definitely arranged with reference to the time when by the schedule the train is to depart. . . . The delay of the train did not enlarge his (the plaintiff's) rights, nor could it entitle him to insist that at the station whence he was to start the office of the ticket seller should not be closed until its arrival."

It is held, however, that where there is a statute which requires that the ticket office at every station on a certain road shall be kept open "at least one hour prior to the departure of each passenger train from such station," the actual departure of the train is meant. Porter *v.* N. Y. Cent. R. Co., 34 Barb. 353; Nellis *v.* Same, 30 N. Y. 505; Chase *v.* Same, 26 N. Y. 523.

ANNES, ADM'X, ETC.

v.

MILWAUKEE & NORTHERN R. CO.

(*Advance Case, Wisconsin. November* 3, 1886.)

The deceased was a passenger on defendant's train. He was riding upon a free pass, on the back of which was an agreement that he assumed all risks of accident; that the company should not be liable under any circumstances whether of negligence of their agents or otherwise, for any injury to his person. The train had proceeded on its way about a mile and a half, and was stalled in the snow. A rescuing engine with a snow-plough attached, with-without stopping or slacking speed, ran into the rear end of the caboose attached to the stalled train, and injured the deceased so that he died. In an action brought by his wife as administratrix to recover damages for the death of her husband, *held:*

1. That the contract relieved the company from liability for damage to him by reason of want of ordinary care of its servants unless the same was expressly made a crime.
2. That it was material for the plaintiff to show that she had no means of support except what her husband furnished her, as tending to prove that his death had caused her a pecuniary loss.
3. That the special verdict in this case was definite and certain, and sufficient to sustain the judgment.
4. That in the charge of the jury a misstatement of the law, made apparently by mistake and not in ignorance of the law, and followed by a correct statement of the law on the subject, was not a prejudicial error as having misled the jury.
5. That, as the deceased was 55 years old, in fair health, and capable of earning $2.25 per day of 10 hours, and his family were, to a large extent, dependent on his labor for his support, a judgment of $2500 is not excessive.
6. That the fact that the jury made an erroneous special finding that the engineer of the rescuing engine could have seen the train in time to have stopped before running into it, is no ground for setting aside a special finding that the negligence of the engineer was gross.

APPEAL from Circuit Court, Brown county.
Hudd & Wigman for respondent, Annes, Adm'x, etc.
George H. Noyes for appellant.

TAYLOR, J.—This action was brought by the respondent to re-

cover damages for the death of her husband, which she alleges was caused by the negligence of the appellant, its ser- FACTS. vants, agents, or employees; he being, at the time he received the injuries which caused his death, a passenger on one of the appellant's trains, and being transported, as such passenger, from De Pere to the city of Green Bay, this State. The material facts in the case are the following:

1. The deceased, at the time he received his injuries, was riding in the caboose attached to a freight train, and was being carried from De Pere to Green Bay.

2. He was travelling upon a free pass, and had paid no consideration for such transportation by the company. On the back of the pass, signed by the deceased, was the following agreement, plainly printed thereon:

"The person accepting this pass assumes all risk of accident, and expressly agrees that the company shall not be liable, under any circumstances, whether of negligence of their agents or otherwise, for any injury to the person, or any loss or damage to the property, of the passenger using this pass. This pass will be forfeited if presented by any other than the person named thereon. I accept all the above conditions.

[Signed] "J. A. ANNES."

3. That after the train had left De Pere, and proceeded on its way towards Green Bay about a mile and a half, it was stalled in the snow, and could proceed no further. Thereupon a brakeman was sent back towards De Pere to procure aid to relieve the train. This brakeman met an engine, with a snow-plough attached, on the road between the stalled train and De Pere, or at De Pere. He communicated the fact that the train was stalled in the snow, and undertook to inform the conductor and engineer where the stalled train was located. He then got on the engine with the snow-plough attached. That engine then ran north towards the stalled train, and, without stopping, ran into the rear end of the caboose attached to the stalled train, breaking the rear end of the caboose, and injuring the deceased so that he died a short time thereafter.

4. That it was snowing at the time the accident took place, and the wind was blowing so as to render it difficult, if not impossible, for those on the engine behind the snow-plough to see the stalled train, towards which they were approaching, when such engine was in motion; that there was no flagman placed on the track behind the stalled train to give warning to the approaching engine and snow-plough, nor was there any bell rung or whistle sounded on the stalled train. The brakeman who went back for the snow-plough says he placed three torpedoes on the track behind the stalled train, but the evidence shows that these were entirely

inadequate to give warning to the approaching engine, and were probably swept off by the snow-plough and not exploded, or, if exploded, the wind and drifting snow prevented those on the engine behind the snow-plough from hearing the explosion.

Upon the trial a special verdict was rendered by the jury as follows:

"*Question* 1. Was the defendant, or its employees, guilty of any carelessness which caused the death of the plaintiff's intestate, James A. Annes? *Answer.* Yes. *Q.* 2. If to the foregoing question an affirmative answer be given, then who was the negligent employee? *A.* Engineer, brakeman, and conductor. *Q.* 3. If to the first question an affirmative answer be given, then state in what did the negligence consist. *A.* The brakeman is guilty in not locating the exact location of the stalled train. The engineer and conductor did not use necessary precaution to prevent the collision. *Q.* 4. If your answer to the first question be 'Yes,' was the carelessness ordinary or gross? *A.* Gross. *Q.* 6. What was the rate of speed—how many miles per hour—at which such engine was running at the time it struck such caboose? *A.* Ten miles. *Q.* 7. Could the engineer of the engine to which the snow-plough was attached have seen the caboose in which the said James A. Annes was seated, in time to have stopped his engine before it struck such caboose? *A.* Yes. *Q.* 8. Was the deceased, James A. Annes, guilty of any want of ordinary care, however slight, contributing to the injury? *A.* No. *Q.* 9. What is the pecuniary loss to the widow of said deceased, James A. Annes, as a direct consequence of his death? *A.* $3500 (three thousand five hundred dollars). CLARK AMES, Foreman."

Exceptions were taken to the several findings of the jury as being unsupported by the evidence, and a motion was made to set aside the verdict, and for a new trial, for the reason that the verdict was wholly unsupported by the evidence, and for errors committed and exceptions taken on the trial.

After hearing this motion, the learned circuit judge set aside the fourth and seventh findings of the special verdict as unsupported by the evidence. The learned circuit judge was of the opinion that there was not sufficient evidence to sustain the seventh finding, viz.: "That the engineer of the engine to which the snow-plough was attached could have seen the caboose in which the said James A. Annes was seated in time to have stopped his engine before it struck the caboose;" and he set aside the fourth finding, that those in charge of the snow-plough and engine were guilty of gross negligence or carelessness in running into the caboose. The learned circuit judge stated that he set aside the fourth finding because he inferred that the jury based that finding on the finding that the engineer on the engine attached to the snow-

plough could have seen the caboose in time to have stopped his engine before it struck the caboose; and, as he was of the opinion that there was no evidence to sustain the seventh finding, and as the fourth was based solely on that, it was also unsupported. After setting aside these findings, the learned circuit judge, instead of granting a new trial, ordered judgment to be entered, upon the verdict so corrected, for the plaintiff, on the condition that the plaintiff should remit $1000 from the damages found; this learned circuit judge being of the opinion that the damages were excessive; and thereupon the plaintiff remitted the $1000, and entered judgment against the defendant for the sum of $2500 and costs, and from that judgment the defendant appeals to this court.

From the course pursued by the learned circuit judge it is evident that he did not consider the fourth finding of the special verdict material in sustaining the plaintiff's action. Had he considered it material, he would necessarily have ordered a new trial, instead of entering a judgment in her favor after setting aside the finding so unsupported by the evidence. We will therefore first consider whether it was necessary for the plaintiff, in order to recover in this action, to show that the injury which caused the death of her husband was the result of gross negligence on the part of the defendant, its employees, agents, or servants, or whether she may recover by showing that such injury occurred by a mere want of ordinary care on the part of the defendant, its employees, agents, or servants.

POWER OF COMPANY TO RELIEVE ITSELF OF ALL LIABILITY FOR NEGLIGENCE

This raises the question whether a railroad company may, in cases where it agrees to transfer passengers without compensation, lawfully contract with such persons so as to relieve itself from all liability for any and all injuries which may be inflicted upon them by reason of any carelessness or negligence of its employees, agents, and servants, whatever may be the degree of such carelessness or negligence, or whether it may contract so as to relieve itself from liability for injuries arising from the mere want of ordinary care on the part of its agents, servants, and employees, and not for injuries resulting from such gross acts of negligence on the part of its agents, servants, and employees as are equivalent to acts of wilfulness or criminal neglect on their part. It would seem that the learned circuit judge must have held in this case that the company could not lawfully contract to relieve itself from any want of ordinary care on the part of its agents, servants, or employees, and that the plaintiff was entitled to recover upon the same evidence that would have entitled her to recover had the deceased not signed the contract above set out. After a careful consideration of the decisions of this court, as well as of the large number of decisions of other courts upon these questions, we have come to the conclusion that the learned circuit judge erred in his decision

in this case as to the binding effect of the contract signed by the deceased in this case.

By an examination of all the authorities cited by the learned counsel for the respective parties upon the argument of this case, as well as others not cited, we find that in England, Canada, New York, New Jersey, Connecticut, and West Virginia, the courts of those countries and States have held that a railroad company may, upon a proper consideration, lawfully contract to relieve itself for any and all negligence on the part of its servants, employees, and agents, without any regard to the degree of such negligence, and that such contract is not against public policy. These courts have therefore held that where the company agrees to carry a person without any compensation, or in different manner, and upon cars in which they do not usually carry passengers, the company may lawfully contract for exemption from all liability on account of the carelessness of its agents, servants, and employees. See the following cases cited by the learned counsel for the appellant: McCawley *v.* Railroad Co., L. R. 8 Q. B. 57; Hall *v.* Railway Co., L. R. 10 Q. B. 437; Duff *v.* Railroad Co., 4 L. R. Ir. 178; Alexander *v.* Railroad Co., 33 Strob. 594; Welles *v.* Railroad Co., 26 Barb. 641: Wells *v.* Railroad Co., 24 N. Y. 181; Perkins *v.* Railroad Co., Id. 221; Smith *v.* Railroad Co., Id. 222; Bissell *v.* Railroad Co., 25 N. Y. 442; Magnin *v.* Dinsmore, 56 N. Y. 168; Kinney *v.* Railroad Co., 32 N. J. Law, 407; s. c. 34 N. J. Law, 513; Griswold *v.* Railroad Co., 53 Conn. 371; Railroad Co. *v.* Skeels, 3 W. Va. 556.

SAME—AUTHORITIES SUPPORTING THE DOCTRINE.

The argument in favor of the rule established in the above cases is perhaps as well stated in the case last cited as in any other. The court say: "By the rule of *respondeat superior* a corporation is made liable for the negligence of its servants; but, when the principal has done the best he could, the rule is technical, harsh, and without any basis of inherent justice. As applicable to corporations, it is of great practical convenience and utility. We do not, therefore, advocate its abolition; but we contend that in a case like the present, when there is no actual fault on the part of the principal, it is reasonable in the eye of the law that the party for whose benefit the rule is given should be allowed to waive it in consideration of a free passage. It is not a case where a party stipulates for exemption from the legal consequences of his own negligence, but one where he merely stipulates against a liability for imputed negligence in regard to which there is no actual fault. It is easy to see, therefore, that considerations of public policy have no application to such a case. . . . The foregoing reasoning, as it seems to us, will also furnish a complete answer to the claim that the defendant must be liable on account of the gross negligence of its servants, for it is manifest that the principal is no

more culpable in the one case than in the other; and, the rule *respondeat superior* being waived, the protection is complete."

The argument in this case would seem to imply that it is against public policy for a corporation engaged in a public capacity to stipulate against acts of negligence on the part of the corporation itself, and that the agreement is only valid when it relieves the company from the imputed negligence of its servants, etc., and that the company might be liable, notwithstanding an agreement to the contrary, if the injury received was the result of the neglect of the company to employ competent servants, or to use safe machinery. These cases are, however, authority for exempting the company from all liability under the facts disclosed in the case at bar.

SAME—AUTHORITIES DENYING THE DOCTRINE.

There is another class of cases which hold that it is against public policy to allow a common carrier to contract to exempt itself from liability, either on account of the negligence of the corporation itself, or of its agents, servants, or employees, without regard to the degree of such negligence or carelessness. It will be found, by an examination of the large number of cases in which this rule is held, that they were cases arising out of the carriage of goods for hire, or where the carriage of the passenger was for a consideration received either directly or indirectly by the carrier. The leading cases upon that subject are the cases of Railroad Co. *v.* Lockwood, 17 Wall. 357, and Railroad Co. *v.* Stevens, 95 U. S. 655, and there are numerous decisions in the courts of the different States which are in accord with the rule established in these cases. The cases of Railroad Co. *v.* Derby, 14 How. 486, and Steamboat, etc., *v.* King, 16 How. 469, are in harmony with the rule laid down in 17 Wall. In these cases, the passenger, it is true, was riding on a free pass, but there was no agreement that he should take the risks of accident in consideration of his receiving such pass. The court very properly held that such passenger, in the absence of any special contract, was entitled to the same protection as one paying for his passage. A similar decision was made by the Supreme Court of Maryland in 1885 (Abell *v.* Maryland R. Co., 19 Reptr. 494). In this last case the court say they do not decide what the effect of a special contract, on the part of the person receiving the free pass, to assume all the risks of accident, would have been as to the liability of the company.

This court has approved of the rule stated by the court in Railroad Co. *v.* Lockwood, and has held that a carrier for hire cannot relieve himself from liability, even by special contract, for its own, or for the negligence of its servants. So far as the carriage of freight is concerned, or for doing any other act as a common carrier other than the carriage of passengers, see Thompson *v.* Telegraph Co., 64 Wis. 531–536;

CARRIER FOR HIRE CANNOT RELIEVE HIMSELF FROM LIABILITY FOR NEGLIGENCE

Candee *v.* Tel. Co., 34 Wis. 471; Hibbard *v.* Telegraph Co., 33 Wis. 558. We see no good reason why the same rule should not be applied to the case of the transportation of a passenger for hire. We think, as is said by the Supreme Court of the United States, "that it is not just or reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants." 17 Wall. 384. But we are also of the opinion that the general rule so laid down must be limited to a case in which the carrier is a carrier for hire, and not when the carriage is gratuitous. The only cases to which we have been cited, or which we are able to find in which that rule has been applied to the case of a gratuitous carriage, are the following: Railroad Co. *v.* Butler, 57 Pa. St. 335; Railroad Co. *v.* Hopkins, 41 Ala. 486–503; Railroad Co. *v.* Selby, 47 Ind. 47; Jacobus *v.* Railroad Co., 20 Minn. 125 (Gil. 110). It will be seen, however, by an examination of this last case, that the only question presented to the court for its decision was whether the defendant company was liable for the gross negligence of its servants. The case of Rose *v.* Railroad Co., 39 Iowa, 246, cited to sustain the rule, was decided upon the construction of the statute of the State of Iowa, and not upon general principles; and the case of Railroad Co. *v.* Read, 37 Ill. 484, does not sustain the rule to the extent stated above.

This court has not adopted the rule laid down by the courts of England, New York, Connecticut, New Jersey, and West Virginia; nor has it adopted the broad rule of the courts of Pennsylvania, Alabama, Indiana, and Minnesota, that all contracts exempting the carrier from liability on account of the negligence of itself, or of its employees and agents, are void as against public policy. In the case of Betts *v.* Farmers' Loan & Trust Co., 21 Wis. 80, the rule of the New York and English cases was adopted, so far as it concerned the carriage of live stock, on the ground that it was questionable whether, in the absence of a statute compelling the carrier to do so, he could be compelled to receive and transport that kind of property; but the court expressly say: "We intimate no opinion as to whether it is or is not competent for a common carrier to make similar stipulations with regard to other kinds of property so as to protect himself against loss or damage for his own negligence, or the negligence or omissions of his agents or servants." This rule, as regards live-stock, has been perhaps modified by this court—at least it does not seem to have been followed—in Morrison *v.* Phillips & Colby Const. Co., 44 Wis. 405; and its authority is questioned in Richardson *v.* Railroad Co., 61 Wis. 596; s. c. 18 Am. & Eng. R. R. Cas. 530.

The rule laid down in Railroad Co. *v.* Lockwood has been, to some extent, approved by this court in the cases of Morrison *v.* Phillips & Colby Const. Co., 44 Wis. 405; Black *v.* Goodrich

Transp. Co., 55 Wis. 319; Richardson *v.* Railroad Co., 61 Wis. 447–445; s. c. 18 Am. & Eng. R. R. Cas. 520. In the case of Morrison *v.* Phillips & Colby Const. Co., *supra*, it seems to have been held that the carrier was liable to the shipper for any ordinary neglect or want of care on its part, or on the part of its agents and servants, notwithstanding the horses (the freight in question) were shipped upon a bill of lading which stated that they were to be at the risk of the owner.

There is another class of cases which hold that, in the case of a passenger who is carried gratuitously by a common carrier, the carrier may, by express contract, relieve himself for the mere neglect or want of ordinary care on the part of the carrier, or of his servants and employees; but that he cannot relieve himself from liability for gross negligence on his part, or on the part of his servants or employees. Although this court has not expressly adopted this rule in a case of the kind at bar, yet it has been stated in several of the opinions in the cases above cited (see Black *v.* Goodrich Transp. Co., Lawson *v.* Railway Co., and Richardson *v.* Railroad Co., *supra*) that the carrier cannot by contract relieve itself from liability for such gross negligence, either of itself or its agents and servants.

In Railroad Co. *v.* Read, 37 Ill. 484, which was a case for an injury received by a passenger riding upon a free pass, and upon a contract in all respects like the one in the case at bar, after a very elaborate argument of the case by counsel, and a carefully considered opinion by the court, it was held "that the agreement did not exempt the railroad company from the gross negligence of its employees, and that it does exempt it from all other species of negligence not denominated gross, or which have the character of recklessness. For such unavoidable accidents as will happen by the best-managed railroad trains this argument would be a perfect immunity to the company."

In the case of Railroad Co. *v.* Morrison, 19 Ill. 136, it was said "that railroads have the right to restrict their liability as common carriers by such contracts as may be agreed upon specially," was a good rule, "the railroad companies still remaining liable for gross negligence or wilful misfeasance, against which good morals and public policy forbid they should be permitted to stipulate." So far as the Illinois court has applied this rule of exemption to cases other than those arising upon a case of gratuitous carriage of a passenger or freight, we do not approve the decision, but are inclined to follow the rule laid down in Railroad Co. *v.* Lockwood, and the numerous other cases following the rule in that case.

The same rule, but perhaps still more restricted, is adopted by the Supreme Court of Georgia in Railroad Co. *v.* Bishop, 50 Ga. 465–473. This case was a case of an employee of the company who had entered into an agreement to take upon himself all the

risks of his position, and that he would in no case hold the company liable for any damage he might sustain by accidents or collisions on the trains or road, or which may result from the negligence or carelessness or misconduct of other employees or persons connected with such road, or in the service of the company. The court say: "We recognize one limitation to this agreement, and that is the limitation the law puts upon all contracts. No man can stipulate for immunity in case he should do an act that is a crime. No contract is a good one that is in violation of law, that which the law forbids, or which is against good morals, or contrary to public policy. Nothing in this contract can therefore protect the company when the negligence which has caused the damage is a crime—when it comes within that kind of negligence which is called, in section 4291 of the Code, criminal negligence, reckless of human safety and human life. That sort of negligence is forbidden by law and punishable by law as penal. It is contrary to good morals and to public policy as declared by law." See also, on this point, Com. v. Railroad Co., 108 Mass. 7; Railroad Co. v. Hopkins, 41 Ala. 486; Railroad Co. v. Mundy, 21 Ind. 48.

CARRIER DOES NOT OWE SAME DUTY TO GRATUITOUS PASSENGER AS TO ONE CARRIED FOR HIRE.

We can see no good reason why the person who seeks a gratuitous carriage from a railroad company should stand in the same position to the carrier as the person who pays for his transportation, and therefore forces the carrier to assume all the duties of such carrier. The carrier is in no case under obligation of law to carry a person gratuitously, as he is when he is tendered his proper compensation, and he does not, therefore, owe the same duty to the person carried gratuitously that he does to the person who pays for his carriage, unless he chooses to accept such duty by not stipulating against assuming it. Nor does it appear to us to be contrary to public policy or to good morals for the carrier to stipulate with the person who desires a gratuitous transportation that he shall assume the ordinary risks of accident which may occur through the want of ordinary care on the part of the servants of the company. So long as the carrier does not attempt to excuse himself from that recklessness of his servants which is dangerous to human life, or is punishable by law, or inconsistent with good morals, it does not seem to us that he is violating any rule of law, or that he is acting against public policy. The argument of the English courts, and the courts of New York, New Jersey, and Connecticut, when limited as above stated, seems to us unanswerable. We are also of the opinion that the carrier cannot stipulate against any negligence of his servants or agents which is expressly made a crime, and punishable by law, even though such negligence may not be of that degree which is denominated gross carelessness or recklessness. See sections 4357, 4358, 4363, 4367, 4392, and 4393. We think that a railroad company, when carrying a passenger gratuitously, is in a condition analogous

to the bailee for the sole benefit of the bailor—as is generally instanced, the case of a person storing goods of another on his premises without compensation—and in such case it has always been held that the bailor shall only be liable for their loss or damage when he is guilty of gross neglect. The carrier who carries a person gratuitously does it, presumably, solely for the benefit of the person carried, and it is but reasonable that he should be allowed to stipulate that he shall be liable only for the gross neglect of his employees and servants, but that public policy prohibits him from stipulating to exempt himself from liability for the gross neglect of such servants and employees. According to the definition of the elementary writer, "gross neglect is the want of slight diligence, or it is the want of that care which every man of common sense, however inattentive, takes of his own property." Lawson, Carr. § 123; Story, Bailm. § 17.

As we hold the contract made by the railroad company with the deceased was effective to relieve the company from liability for any damage to him by reason of a want of ordinary care on the part of its servants and employees unless it was caused by some criminal act of such servants or employees, it becomes necessary for the plaintiff to show by the evidence that the death of the deceased was caused by reason of the gross carelessness of such agents and servants. It is clear, therefore, that the circuit judge erred in entering judgment on the special verdict as amended by him, and should, in his view of the evidence, upon the question of gross neglect of the employees and servants of the defendant, have ordered a new trial.

CIRCUIT COURT SHOULD HAVE ORDERED NEW TRIAL.

We are of the opinion that the practice of the circuit court in this case ought not to prevail, and that, in all cases where the circuit court undertakes to set aside a special finding in a special verdict, a new trial should be ordered, unless it clearly appears that the finding is wholly immaterial, and can have no effect as to the judgment which should be entered in the action. We are all of the opinion that, upon the whole evidence in the case, the question of the gross negligence of the employees of the defendant in this case was clearly a question for the jury, and that the circuit judge erred in setting it aside as unsupported by the evidence. The mistake of the learned judge was in holding that there was no sufficient evidence of the gross misconduct of the employees of the company, and in holding that the gross negligence found by the jury was based solely on the fact that the jury found that the men on the engine could have seen the stalled train in time to have stopped before running into it. Whether they could or could not see was not conclusive as to the question of their gross negligence. The very fact, if it was a fact, that they could not see, might tend to show gross carelessness in not stopping the train before running into it. If they could not see it, and they had no definite knowl-

edge as to the exact location of it, it was evidence tending to show gross negligence not to stop the train before striking, or, at all events, in not slackening speed so as not to endanger the lives of those on the stalled train before running into it. That there was sufficient evidence to go to the jury on the question of gross negligence it seems to us is very clear. See Com. *v.* Railroad Co., 108 Mass. 7–12; Lawson *v.* Railroad Co., 64 Wis. 447, 458; Moseley *v.* Nacoochee, 28 Fed. Rep. 462–467.

The case in 108 Mass. was an action to recover under the provisions of section 97 of chapter 63 of the General Laws of that State, which provides as follows: "If, by reason of the negligence or carelessness of a corporation, or of the unfitness or gross negligence of its servants or agents, the life of any person, being a passenger, is lost, the corporation shall be punished by a fine not exceeding $5000, nor less than $500, to be recovered by indictment," etc. The only evidence in that case was that the death was caused by the collision of the train on which the deceased was a passenger with a hand-car which the track-master suffered to be on the track through a mistake in time, occasioned by his failure to observe correctly the hour indicated by his watch. The track-master testified as follows: "Thinks he examined his watch before he started, and is certain he looked at it while on his return, and read the time as five minutes to ten." In reality it was "ten minutes to eleven," and the watch indicated that time, and it was within the running time of the morning train between Royalston and Athol. The accident was wholly occasioned by the foregoing conduct of the track-master, and no other negligence is charged in the case. In this case it was said by the supreme court that the question of the gross negligence of the track-master was properly submitted to the jury. There was certainly much more evidence in the case at bar to establish the gross negligence of those in charge of the engine and snow-plow than there was in the case cited. The court should have directed a judgment in favor of the plaintiff upon the special verdict.

It is alleged as error that the plaintiff was allowed to show on the trial that she had no means of support except what her husband had furnished her. We think that fact was a proper matter of proof. It tended directly to show that she had suffered a pecuniary loss by the death of her husband.

The second error assigned is the admission of the evidence of the witness Loper as to what one of the train-men said to him at the time of the accident about the speed at which the engine and snow-plough were running. This evidence should perhaps have been excluded; but its admission has not prejudiced the defendant, as the verdict of the jury as to the speed of the train is very clearly not based upon it. The witness testified that the train-man told him they were running at the rate of twenty-five or thirty miles an

hour. The jury found they were running at the rate of ten miles an hour. It is evident, therefore, that their verdict is not founded on this evidence.

Third, it is urged that the verdict is so indefinite that no judgment can properly be rendered upon it. We are not able to find anything uncertain or indefinite in the verdict, and it is quite sufficient to sustain a judgment against the defendant.

The objection that the rate of speed found by the jury is wholly unsupported by the evidence is clearly not well taken.

Fifth, it is urged that the $2500 damages, for which judgment was taken, is excessive. The deceased was fifty-five years old. Though not a robust man, he was in fair health—a workman who could earn $2.25, working ten hours per day, and at that rate for less time. His family were, to a large extent, dependent upon his labor for their support. We cannot say, as a matter of law that his life was not worth the sum of $2500 to his widow. As compared with other verdicts which have been sustained by this court, it is clearly not excessive. Johnson *v.* Railroad Co., 64 Wis. 225; Schreier *v.* Railroad Co., 65 Wis. 457; Lawson *v.* Railroad Co., 64 Wis. 447.

QUESTION OF EXCESSIVE DAMAGE.

We find nothing in the instructions to the jury which are objectionable, except the following sentences: "Gross negligence is often defined to be the want of extraordinary care; ordinary negligence being the want of such care as men of prudence exercise in their own affairs. There are men that are extraordinarily careful and prudent much beyond the average. Gross negligence is the want of such extraordinary care as men of that class usually exercise." To this last sentence the defendant duly excepted. It is quite apparent that the learned judge clearly misstated the law, and gave a definition of gross negligence which is contrary to all authority. How this misstatement of the law occurred we cannot say, but we are satisfied that it was a pure mistake on the part of the learned judge, and not a statement made in ignorance of the law on the subject. This is evident from the fact that the learned judge follows this statement immediately by another statement of what constitutes gross negligence which is in accord with its true definition, as follows: "This degree of negligence, that is, gross negligence, usually involves the element of wanton recklessness and disregard of life or property, and such a course of conduct as constitutes criminal negligence, and which makes the guilty party criminally liable when life is lost. In this case, in reference to this particular question, in order to justify you in finding that there was negligence here, and it was of such a character as is denominated gross, you must find the existence of such wanton recklessness and disregard of life and property as I have defined." Taking the charge as a whole, it was fully as favorable to the defendant upon this question as the law will permit, and it seems to us that the jury

could not have been misled by the mistake of the learned judge in his first attempt to define gross negligence. We would not feel justified in reversing the judgment for such mere mistake in stating the law when the mistake was immediately and fully corrected by the rest of the charge.

The judgment of the circuit court is affirmed.

Injury to Passenger Riding on Pass.—See Carroll *v.* Missouri Pac. R. Co., and note, 26 Am. & Eng. R. R. Cas. 268; Gulf, Colo. & S. F. R. Co. *v.* McGowan, 26 Ib. 274.

ECKERD.

v.

CHICAGO AND NORTH WESTERN R. CO.

(*Advance Case, Iowa. December* 15, 1886.)

The plaintiff received personal injuries caused by the defendant railway company in not providing a proper place for passengers to alight from its trains, and not drawing the car in which plaintiff was riding up to the station platform, so that, in stepping from the car to the ground, she fell and hurt herself. The jury was instructed that "if, in the exercise of ordinary care, the plaintiff might have safely gained the platform, as by passing through the car forward, and she elected to take the risk of alighting where she did, instead of taking the safe course, she was guilty of negligence, and could not recover." The evidence showed that she could have stepped from the train to the platform by passing through the car in front of that in which she was riding. *Held*, that the jury was bound to give a verdict for defendant.

In an action for damages for personal injuries, where there is no evidence of the amount of medicine, or medical treatmet employed by the injured person on account of such injuries, it is error to instruct the jury that they may allow for medicines and medical treatment reasonably and necessarily employed.

APPEAL from Circuit Court, Boone county.

Action for a personal injury. The plaintiff, Mrs. E. C. Eckerd, took passage on one of the defendant's trains, and, when attempting to alight therefrom at the station at Ontario, fell, as she claims, and received an injury. The negligence of the defendant, she alleges, consisted in not providing a safe, suitable, and convenient place for passengers to alight, and in not causing the car in which she had been riding to be drawn up to the platform. There was a trial to a jury, and verdict and judgment were rendered for the plaintiff. The defendant appeals.

Hubbard, Clark & Dawley for appellant.

E. E. Webb for appellee.

ADAMS, C. J.—The lowest of the car steps appears to have been about three feet from the ground, and was, so far as the evidence shows, of the ordinary height, and it had the usual railing at the side. The ground appears to have been in good condition. The platform of the station was long enough for the business of a small station like that at Ontario, but the car in which the plaintiff was riding, to wit, the first behind the smoking car, did not quite reach the platform when the train was stopped. The plaintiff could have stepped directly upon the platform by walking through the car which was ahead of the one in which she had been riding. It was daylight when she alighted; and there was nothing to prevent her from judging correctly of the distance of the step from the ground. As she was going out of the car, a lady acquaintance, about to take passage, met her, and passed by, having ascended the same steps, but neither this acquaintance nor any one but the plaintiff became aware of any accident. A few weeks afterwards the plaintiff's family physician, at the request of her husband, visited her, but discovered no appearance of any injury except from what she said, and did not prescribe for her. There was evidence that the plaintiff applied liniment of some kind, but there is no evidence as to what expense she incurred, if any.

1. The court instructed the jury that they might, if they found for the plaintiff, allow for medicines and medical treatment reasonably and necessarily employed. But, there being no evidence upon which any estimate could be based, we think that the court erred. Reed *v.* Chicago, R. I. & P. R. Co., 57 Iowa, 23; s. c., 8 Am. & Eng. R. R. Cas. 180.

2. The court gave an instruction in these words: "If, with the opportunities afforded by the defendant at the time, the plaintiff, in the exercise of ordinary care, might have safely gained the platform, as by passing through the cars forward, and she elected to take the risk of alighting where she did, instead of pursuing the safe course, she is guilty of negligence, and cannot recover." The evidence shows that, whatever danger there was in stepping directly upon the ground from the steps of the car in which the plaintiff had been riding, she could estimate it. There was nothing concealed or deceptive about it. She had to make her election to alight as she did, or pass forward, as passengers upon long trains are constantly called upon to elect under similar circumstances. There was nothing to hinder her from passing forward. The instruction appears to us to express the law. But, in any event, the jury was bound to obey it. Under this instruction and the evidence the verdict should have been for the defendant. Reversed.

Passengers Injured by Alighting from Train which did not Stop Opposite Platform.—Trains must be stopped at stations so that passengers may alight at platform.

In Delmantyr v. The Milwaukee, etc., R. Co., 24 Wis. 578, the plaintiff received an injury while descending from defendant's train at Hanover Junction. The train consisted of two cars of which the one in the rear was the ladies' car, and the other the gentlemen's car, next to which in front was the baggage car. When the train stopped at junction, plaintiff was seated in the ladies' car. As directed by the brakeman, she passed through the gentlemen's car to the car platform at its front end for the purpose of descending there. The steps attached to this platform had not been drawn up directly opposite to the station walk or platform, which the plaintiff could not reach by stepping down in the usual manner, but was obliged to jump some distance obliquely. As she sprang she fell and in the fall broke her arm. No officer or employee of the company was present to assist her in alighting. It was *held* that the plaintiff was entitled to recover. See also Robson v. The N. E. R. Co., L. R. 10 Q. B. 271.

In Indianapolis R. Co. v. Farrell, 31 Ind. 408, the train ran beyond the platform and stopped over a culvert.

It was dark and plaintiff in getting off the train fell into the culvert and was injured, and it was held that he was entitled to recover. See also Whitaker v. Manchester, etc., R. Co., L. R. 5 C. P. 464, a case precisely similar and wherein the plaintiff was allowed to recover.

In Cockle v. South Eastern R. Co., 27 L. T. (N. S.) 320, an English case, it appeared that the car in which the plaintiff rode, being the last car, remained about four feet from the platform where the train had stopped and the plaintiff in attempting to alight, believing she was about to step on the platform, fell and was injured. It was *held* that plaintiff could recover. In this case Cockburn, J., said, "It appears to us that the bringing up of a train to a final standstill . . . amounts to an invitation to alight. At all events, after such a time has elapsed that the passenger may reasonably infer that it is intended he should get out if he proposes to alight at the particular station." Praegar v. The Bristol & Exeter R. Co., 24 L. T. Rep. N. S. 105, was a case exactly similar and the plaintiff recovered.

In St. Louis, etc., R. Co. v. Cantrell, 37 Ark. 519, 40 Am. Rep. 105, where a passenger was aroused at ten o'clock at night by the conductor and informed that his station was reached and told by him and the brakeman to hurry and get off. The train was moving very slowly and he stepped off and as it had gone past the platform he fell and was injured. It was *held* that an action was maintainable therefor. Judge Harrison said: "It was clearly the duty of those in charge of the defendant's train upon its arrival at Knoble to stop the same opposite the platform," etc. See also Filer v. New York, etc., R. Co., 49 N. Y. 47; 10 Am. Rep. 327; Lambert v. North Car. R. Co., 66 N. C. 499; 8 Am. Rep. 508; Penn. R. Co. v. Aspell, 23 Penn. St. R. 149; McDonald v. Chicago & N. W. R. Co., 26 Ia. 124; Hartwig v. Chicago & N. W. R. Co., 49 Wis. 358.

BULLARD

v.

BOSTON AND MAINE R. CO.

(*Advance Case, New Hampshire. July* 30, 1886.)

The plaintiff, while travelling on defendants' train, occupied the rear car, by the conductor's direction. When the train arrived at the station the car was not opposite the depot platform, and the plaintiff was injured in stepping to the ground. Evidence was admitted to show that others had previously been directed to take that car, and in alighting from it as the plaintiff did, had been injured. *Held*, that such evidence is competent to show negligence in the defendants in not providing a suitable stopping place, and to show want of negligence in the plaintiff.

When counsel in argument makes a statement of a material fact not in evidence, against the objection of the other party, he violates the right of a fair trial, and his client assumes the burden of presenting and proving his claim that the decision was not affected thereby.

RESERVED case from Rockingham County.

Case for injuries received by the plaintiff in alighting from the defendants' passenger car at Newton Junction. Trial by a jury. For some three weeks prior to the injury the plaintiff had been travelling over the defendants' road from Newton Junction to Haverhill, Mass., and back, daily. On the day of the injury she was returning from Haverhill in the afternoon train, and was in the rear car, by the conductor's direction. When the train stopped at the junction, this car was not opposite the depot platform, and the plaintiff was injured in stepping or jumping from the bottom step of the car to the ground, the distance being about three feet. She testified that she knew the rear car of the train did not ordinarily reach the platform, and that the place where she got out was a bad one; also that the conductor assisted her in alighting at the same place shortly before the time of the accident, and that he said it was a bad place. The accident occurred in the daytime. Rowell testified, subject to exception, that he had got out of the car several times at the same place, when the situation was the same as when the plaintiff was injured, and that it shook him up. Mrs. Tucker testified, subject to exception, that it was the defendants' custom not to allow passengers to go forward from one car to another in getting out at stations; that passengers taking a train at Haverhill for upper stations were usually directed by the conductor to take the rear car; and that she had jumped off the train several times at the place where the plaintiff did, and had felt the effects for half an hour or so. The defendants moved for a nonsuit. The motion was denied, and defendants excepted.

The defendants' counsel, in his argument to the jury, commented on the fact that one of the physicians consulted by the plaintiff had not been called to testify. The plaintiff's counsel said the reason was because he found, from conversation with him, that he had not examined the plaintiff, and could give no testimony as to her condition. To this the defendants excepted. The court sustained the exception, and told the jury to disregard the statement of plaintiff's counsel; and thereupon counsel said he would take it all back. Verdict for the plaintiff, which defendants moved to set aside. Motion denied, and defendants excepted.

Marston & Eastman for plaintiff.

Copeland & Edgerly and *J. S. H. Frink* for defendants.

SMITH, J.—1. The testimony of Rowell was competent upon the question whether the defendants furnished safe and reasonable facilities for passengers to leave their trains at this point. Evidence that other passengers were injured in leaving the train at the same place tended to show that it was negligence in the defendants not to provide a larger platform. His evidence was also competent upon the question whether passengers left the train at this place with the knowledge or permission of the defendants. Hall *v.* Brown, 58 N. H. 93; State *v.* Manchester & L. R., 52 N. H. 528.

EVIDENCE—INJURY TO OTHER PASSENGERS.

The testimony of Mrs. Tucker was competent upon the question whether it was negligence in the plaintiff to leave the car where she did. If her testimony was true, a passenger in the rear car for that station must choose between leaving the car at a place which might be unsuitable, and being carried beyond the point of his travel, a *quasi* prisoner. Hall *v.* Brown, *supra;* State *v.* Manchester & Lowell R., *supra.* Her testimony, that passengers taking the train at Haverhill for upper stations were usually directed by the conductor to take the rear car, was competent, as tending to show the usage of the road, and how the defendants regarded it as being a proper place for passengers to leave the train. And her testimony as to the effect produced upon her by jumping from the train was competent, for the same reason as similar testimony from Rowell was competent.

2. In moving for a nonsuit it must be assumed the truth of the plaintiff's evidence was conceded. The evidence introduced by her tended to show that the defendants stopped their train before the car in which she was riding had reached the platform; that the rear car did not ordinarily reach the platform; that the conductor had assisted her to alight at the same place a short time before; that other passengers were accustomed to leave the train at the same place; that she was in the rear car by the conductor's direction; and that pas-

DUE CARE OF PLAINTIFF IN LEAVING TRAIN.

sengers were not allowed to go forward from one car to another in leaving the train at stations. These facts were evidence from which the jury might find that the plaintiff exercised due care in leaving the train at a place which she knew was a bad one for alighting—Baltimore & O. R. Co. *v.* Leapley, 4 Atl. Rep. 891 (Maryland Court of Appeals, June, 1886)—and further might find that the defendants intended she should leave at that place. Forsyth *v.* Boston & A. R., 103 Mass. 510, and Frost *v.* Grand Trunk Ry., 10 Allen 387, are distinguishable from this case. In those cases there was no evidence that the defendants held out any inducement to the plaintiffs to do the acts by which they were injured. Hurlbert *v.* New York Cent. R., 40 N. Y. 145, is more nearly in point.

3. The defendants' counsel, in his argument to the jury, commented on the fact that one of the physicians consulted by the plaintiff had not been called as a witness. This was fair matter of argument. The defendants could rightfully ask the jury to believe that, if the physician had been called, his testimony would have been unfavorable to the plaintiff. However slight the weight such an inference ought to have, the jury could not be instructed that, as a matter of law, they were bound to wholly disregard it. The case does not raise the question whether any argument could have been legally advanced in reply. No argumentative reply was made; but the plaintiff's counsel said that the physician had not been called because he found from conversation with him that he had not examined the plaintiff, and could give no testimony as to her condition. If this hearsay proof of a material fact had been received from a witness, its unrevoked admission would have been corrected by a new trial. The physician conversed without the moral and legal sanction of an oath, and without the test of cross-examination. His conversation, not provable by a witness, was proved by a person not a witness, not sworn, and not subject to cross-examination. Had the plaintiff's whole case been proved in the same way, the error, though extended in fact over more ground, would not have been raised to a higher degree of illegality. If the plaintiff could retain a verdict obtained or enhanced by her counsel's unsworn assertion of inadmissible hearsay in argument, the actual wrong done the defendants would be no greater were it accomplished by other persons giving the jury the same kind of proof privately and criminally. The court had no more authority to admit the hearsay, and dispense with the oath and the opportunity for cross-examination required by law, than to render judgment, without any form or pretence of trial, upon a rumor casually herd in the street.

REMARKS OF COUNSEL—EFFECT ON JURY.

The law does not transfer the defendants' property to the plaintiff as damages without a fair trial, and, in a legal sense, a trial is not fair when such statements as were made in this case have any influence favorable to the party making them. He is therefore bound

to do everything necessary to be done to rectify his wrong, and restore to the trial the fairness of which he has divested it. He is legally and equitably bound to prevent his statement having any effect upon the verdict. This he cannot do without explicitly and unqualifiedly acknowledging his error, and withdrawing his remark in a manner that will go as far as any retraction can go to erase from the minds of the jury the impression his remark was calculated to make. But it is by no means certain that the jury will, at his request, disregard the fact stated. It is necessary they should be instructed that the unsworn remark is not evidence, and can have no weight in favor of the party improperly making it. It is the duty of the wrong-doer to request such instructions. The other party does his duty when he objects to the wrong inflicted upon him, and does not allow it to be understood that he waives his objection. In spite of the fullest and frankest retraction, and the most explicit and emphatic instructions to lay the remark entirely out of consideration, the trial may not be fair. It may not be in the power of the retracting counsel and the court to remove the prejudice. Their combined and vigorous exertions may not control the mental operations of the jury. The jury may not be able to wholly free their memory or their judgment from the unfair and illegal impression made by a plausible statement of fact, which may seem to them entitled to more respect than the rule of law that excludes it. The statement, withdrawn not because it is contrary to the fact, but because it is not a legal mode of proving the fact, may do as much damage as if it had not been withdrawn. Erroneous testimony corrected by the witness who gave it, and an erroneous ruling corrected by the judge who made it, stand on different ground.

If a party should sit as a juror in his own case, it might not be enough for his counsel to request him to ignore his own interest, and for the court to instruct him it is his duty to do so. If all the jurors had formed a decided opinion on the merits of the case before they were impanelled, the request of counsel, and the instructions of the court, not to be swayed by their former convictions, or by what they had heard at their lodgings, or read in the newspapers, during the trial, might not make the trial fair. After everything possible is done, the bias of interest or previous opinion may not be wholly overcome. In such cases as this the operation of the retraction and the requested instructions can be most accurately estimated at the trial term after verdict. Burnham *v.* Butler, 58 N. H. 568; Cole *v.* Boardman, 63 N. H. 580, 583. In some cases they may, and in others they may not, be effectual. Much may depend upon the sincerity and earnestness of the retractor's efforts to counteract his fault. If the trial is allowed to go on, he will be bound, after verdict in his favor, to obtain a finding that the result was not

WITHDRAWAL OF STATEMENT MADE IN ARGUMENT—AUTHORITIES.

affected by his tort, and ought not to be annulled on account of it. Whether the error is such that justice seems to require the trial to be stopped, and begun anew before another jury, immediately, or after a lapse of time (Hamblett *v.* Hamblett, 6 N. H. 333, 347; Pennsylvania Co. *v.* Roy, 102 U. S. 451, 459), is ordinarily a question of fact. If the trial is broken off, or the verdict set aside, there is a question of costs. Whatever is done, indemnification is the duty of the party by whom, for a time at least, the course of justice is interrupted and perverted. He is not entitled to a discharge of the jury, a waiver of the objection, or a gain of any advantage.

In Brown *v.* Swineford, 44 Wis. 282, the court, reversing a judgment and ordering a new trial on an exception of this kind, say:

"The learned counsel went beyond the legitimate scope of all argument, by stating and commenting on facts not in evidence. . . . The appellant took his exception, and his counsel now supports it by numerous cases. . . . All of them support the rule now adopted by this court, that it is error, sufficient to reverse a judgment, for counsel, against objection, to state facts pertinent to the issue and not in evidence, or to assume *arguendo* such facts to be in the case when they are not. Some of the cases go further, and reverse judgments for imputation by counsel of facts not pertinent to the issue, but calculated to prejudice the case. . . . There are cases in conflict with those which support this rule. But, in the judgment of this court, the rule is supported by the weight of authority and by principle. Doubtless the Circuit Court can, as it did in this case, charge the jury to disregard all statements of fact not in evidence, but it is not so certain that a jury will do so. Verdicts are too often found against evidence, and without evidence, to warrant so great a reliance on the discrimination of jurors. And, without notes of the evidence, it may be often difficult for jurors to discriminate between the statements of fact by counsel, following the evidence, and outside of it. It is sufficient that the extraprofessional statements of counsel may greatly prejudice the jury, and affect the verdict. . . . It is the duty of counsel to make the most of the case which his client is able to give him; but counsel is out of his duty and his right, and outside of the principle and object of his profession, when he travels out of his client's case, and assumes to supply its deficiencies. Therefore is it that the nice sense of the profession regards with such distrust and aversion the testimony of a lawyer in favor of his client. . . . The very fullest freedom of speech within the duty of his profession should be accorded to counsel; but it is license, not freedom of speech, to travel out of the record, basing his argument on facts not appearing, and appealing to prejudices irrelevant to the case, and outside of the proof."

In that case, there was no retraction by counsel, and no finding of the fact of a fair trial.

In Jacques *v.* Bridgeport H. R. Co., 41 Conn. 61, the plaintiff's damages were assessed by a judge without a jury. Certain evidence was admitted, subject to the defendants' "objection, to be heard in the argument." After the argument, this evidence "was ruled out and rejected, and no portion of it was considered by the judge, who so stated in open court when rendering his decision." The court say:

"Nor is the effect of this testimony upon the mind of the judge, in reaching the decision pronounced on the merits, to be entirely disregarded. We cannot accede to the claim of the plaintiff that the defendants could not have been injured by this testimony because it was ultimately rejected and ruled out. The operations of our minds are mysterious even to ourselves. We cannot always appreciate the influences which lead us to a result. No doubt the judge who tried the cause intended to disabuse his mind of any influence from this testimony. No doubt he was unconscious of being affected by it. Possibly he was not. Still we do not deem it improbable that he was, especially when we look at the amount of damages assessed in the case, which seems to us unwarrantably large in view of the legitimate evidence."

In Dougherty *v.* Welch, 53 Conn. 558, 560, the court say:

"No man can be quite certain that he is aware of all the influences which have produced conviction. It is one thing to prevent the entry of an influence into the mind; quite another to dislodge it."

But the court also say:

"It would be impossible to conduct judicial investigations upon the theory that everything which reaches the ear of the trier affects his final determination of questions of fact, beyond all power of resistance upon his part."

Whether the final determination is thus affected, is a question of fact, and in our practice the rule is that questions of fact are to be settled at the trial term.

In State v. Towler, 13 R. I. 661, 665, some of the cases are cited in which it is held that an error committed by the admission of incompetent testimony is cured by its subsequent rejection or withdrawal, if the jury are clearly directed not to regard it. "The ground of these decisions," say the court, "is that the testimony, after being rejected or withdrawn, is no longer legally before the jury, but is out of the case; and the jury being instructed to disregard it, it is to be presumed that they follow the instruction. The defendant contends that the rule ought not to be applied in the case at bar, because the testimony was withdrawn, not as incompetent, but avowedly to remove all ground for exceptions. We think, however, that the rule does not depend on the motives

which influenced the withdrawal. The question is, did the withdrawal take the testimony out of the case? If it did, it is to be considered as if it had never been admitted. We think the withdrawal, being by consent of court, it is to be regarded as the act of the court, and that, in contemplation of law, it purged the case absolutely of the testimony. The defendant insists that the testimony, though withdrawn, must inevitably have had an influence on the jury, and that this influence must have been aggravated by the statement of the prosecuting attorney that he had other witnesses to reputation, which he withheld because of the defendant's objection. We have no doubt that juries are often influenced by extrinsic matters. We regret to say, too, that there is reason to think that lawyers sometimes do and say things for the purpose of producing an effect on the minds of the jury which is not legitimate. Such conduct may afford ground for new trial if there is reason to suppose the jury has been influenced by it, as, indeed, the erroneous admission of testimony, subsequently ruled out, may afford ground for a new trial if there is reason to think the jury has been influenced by it. But the true mode of getting a new trial on such ground is by petition addressed to the discretion of the court, and not by bill of exceptions; for we cannot presume that the jury has been influenced, and in a bill of exceptions the court exercises no discretion on matters of fact, but only grants a new trial where, in point of law, some material error has been committed. Unangst *v.* Kraemer, 8 Watts & S. 391. The court does not get, by a bill of exceptions, the information which will enable it to exercise a judicial discretion. In the case at bar we are informed only in regard to what occurred in the matter of the rulings which are reported for revision. For anything that appears, the evidence against the defendant, independently of the evidence of reputation, may have been utterly overwhelming, and there may be no foundation whatever for the supposition that the jury was influenced either by the evidence of reputation, or by the reprehensible remarks of the prosecuting attorney."

In a capital case, if the prosecuting officer, having introduced a great amount of every kind of incompetent testimony, should at last meet repeated objection by informing the jury, expressly or by insinuation, in an observrtion addressed to the court, that he had a convincing mass of similar evidence of the prisoner's guilt, but would withhold it for the purpose of avoiding technical exceptions, and for the same purpose would withdraw what had been objected to, the withholding and withdrawing might be an effective part of the State's case, and the life of the accused might be endangered by his exercising his right of objection. The law would not depend upon the motive of the prosecuting officer; but having violated the right of fair trial, and necessarily assumed the affirmative and the burden of proof on his implied plea, in confession and

avoidance, that he had made complete amends, his apparent motive, whether averred or inferred, might be important evidence on the question of fact raised by that plea.

State *v.* Towler is an authority for a conclusive legal presumption, on a bill of exceptions, in such a case, that the jury are not influenced by the illegal proceeding if they are fairly instructed to disregard it, and for the rule that the defendant's remedy is a petition for a new trial. After judgment of conviction in a criminal case, a new trial may be granted on the defendant's petition, when justice has not been done through accident, mistake, or misfortune, and a further hearing would be equitable. Buzzell *v.* State, 59 N. H. 61. In the present case the illegal proceeding occurred during the trial, and in open court; and, if a supplementary petition for a new trial is a possible remedy, it is unnecessary. State *v.* Ayer, 23 N. H. 301, 320; Allen *v.* Aldrich, 29 N. H. 63, 75; State *v.* Knapp, 45 N. H. 148, 157–160. In our simple and convenient system of practice, if the indisputable error was harmless, that fact can be found on the plaintiff's motion at the trial term. The party violating the right of fair trial accepts the burden of presenting and proving his claim that he has made full restitution, and that the decision of the jury was not affected by his admitted wrong. On the question of influence, his acknowledgment, retraction, and apparent motives, the instructions given at his request, and the verdict, are evidence, but do not shift the burden of proof. That burden is not to be unjustly thrown upon the other party, by putting him to a petition for a new trial; nor is his exception unjustly overruled by a conclusive legal presumption as to the effect of instructions. If a perfect reparation of the violated right is not found as a fact, the injured party remains entitled to redress, and neither on exception nor on petition can the fact be falsely found by an inference of law. A discretionary power of compelling him to submit to an unfair trial is not vested in the court. What is called judicial discretion in such a case is a performance of the duty of correctly deciding the question of fact at the trial term. Bundy *v.* Hyde, 50 N. H. 116, 120; Darling *v.* Westmoreland, 52 N. H. 401, 408.

The defendant is entitled to a new trial unless the plaintiff obtains an amendment of the record supplying the fact that has not been found. If the plaintiff desires an opportunity to move for such an amendment, the case will be continued *nisi* to await the result of a hearing on his motion.

BLODGETT, J., did not sit. The others concurred.

Injury to Passengers Alighting from Train not Opposite Platform.—See Eckert *v.* Chicago & N. W. R. Co., and note, *ante*, p. 114.

Baltimore and Ohio R. Co.

v.

Rose.

(*Advance Case, Maryland. June* 23, 1886.)

The appellant was the owner of a pier which was used for the accommodation of those engaged in traffic with it. The ground abutting upon said pier also belonged to appellant, on which was constructed tracks for the running of cars and engines, for the purpose of conveying articles of merchandise to and from the pier, and other piers and wharves adjacent thereto. There was also a trestle, with railway tracks on it, and a gangway, on the side of which persons can walk. At the end toward the pier the ascent to and descent from this trestle was by a stairway; in descending this stairway the appellee, who was a steward upon a vessel lying at the pier by permission of the appellant, was injured by a fall occasioned by the broken condition of the steps. In an action to recover damages, on the ground that the injury was caused by the negligence of the defendant in not keeping the said steps in proper condition to afford a safe transit, *held*, that a right of transit to and from the pier was implied in the arrangement between the two companies, and that, in the absence of proof that a particular way had been constructed and designated for the purpose of ingress and egress, persons could use any way not prohibited by the defendant.

Appeal from the Circuit Court for Baltimore county.

The opinion states the case.

John K. Cowen and *W. Irvine Cross* for appellant.

A. H. Taylor and *W. S. Keech* for appellee.

Yellott, J.—The appellee, the plaintiff below, was employed as steward upon the steamship "Leipzig," of the North German Lloyd Line, which ship was lying at pier No. 9, in the harbor of Baltimore, discharging and taking in cargo. The said pier Facts. is the property of the appellant and is used for the accommodation of those engaged in traffic with it. The ground abutting upon said pier also belongs to the appellant, and on it are constructed tracks, for the running of cars and engines, for the purpose of conveying articles of merchandise to and from this pier and other piers and wharves adjacent thereto. There is also a trestle, with railway tracks on it, and a gangway on the side, on which persons can walk in going to and from Towson street. At the end towards the pier the ascent to and descent from this trestle is by a stairway; and in descending this stairway the appellee was injured by a fall occasioned by the broken condition of the steps. He brought suit against the appellant in the court below for the recovery of damages, on the ground that the injury was caused by the negligence of the defendant in not keeping the said steps in proper condition to afford

a safe transit. The verdict and judgment being for the plaintiff, the defendant appealed. It is admitted by an agreement in the record "that the steps from which the defendant fell were a part of a trestle-work, situated on the land of the defendant, adjoining the pier also of the defendant, and were the exclusive and private property of the said defendant." It is also agreed between the parties to the cause that "the piers of the Baltimore & Ohio R. Co., of which pier No. 9, mentioned, is one, are used by the ships of the North German Lloyds Steamship Company Line, for the purpose of lying at them, and discharging freight and passengers upon them, by permission of the defendant, without wharfage charges paid by the owners of said steamship, or others, to the defendant, but in order that the freight and passengers brought by said steamships may be transferred from the ships of said steamship company to the cars of said defendant, lying upon certain tracks of said defendant, constructed out upon said pier; no reference here being had to the tracks upon the elevated trestle on shore near by, used for coal cars for the purpose of making said transfer more conveniently."

The trestle referred to is about fourteen feet in elevation at the end in proximity to the pier, and is ascended by a stairway. At the other end is an outlet to Towson street. This trestle had three tracks for cars and a gangway about three feet wide with a hand-rail on the side. At the time of the accident the tracks were only used for the purpose of placing empty cars in position for making up trains, and loaded cars were not run on the trestle, which had been abandoned for that purpose. The ground below was covered with tracks, constructed for the conveyance of freight to and from the vessels lying at the piers. There was a narrow foot-path on the side adjacent to the trestle, which was not marked by any curbing. There is no evidence in this record of the construction of any way by the defendant for the especial and exclusive use of persons passing to and from the vessels, and it is proved that many passengers used the trestle, while others selected the pathway below.

Undoubtedly, under the arrangement existing between the two companies, persons employed on board the steamer had a right of transit over the property of the defendant. If there was no particular road or pathway designated and set apart for their use they were constrained to seek such route as they found open and convenient, and the only obligation resting on them was the observance of due care and caution in the avoidance of danger. The defendant, however, had a right if it saw fit to inhibit the use of the trestle, and restrict the passengers to the use of the ground below. There is evidence that this was done by a notice placed in a conspicuous position, but this evidence is met by countervailing proof, and the fact thus in dispute should necessarily be left for ascertainment by the jury.

RIGHT OF EMPLOYEES ON STEAMER TO USE STAIRWAY.

The obligation of the defendant to keep any property over which

other persons have a right to pass in a safe condition cannot be questioned. As was said by the Supreme Court of Massachusetts, in Sweeny *v.* Old Colony, etc., R. Co., 92 Mass. 373, "the general rule or principle applicable to this class of cases is that an owner or occupant is bound to keep his premises in a safe and suitable condition for those who come upon and pass over them, using due care, if he has held out any invitation, allurement or inducement, either express or implied, by which they have been led to enter thereon." If the owner, either "directly or by implication, induces persons to enter upon and pass over his premises, he thereby assumes an obligation that they are in a safe condition suitable for such use, and for a breach of this obligation he is liable in damages."

OBLIGATION TO KEEP PASSAGE-WAYS IN REPAIR —AUTHORITIES.

This is the recognized principle in this country and in England. In Corby *v.* Hill, 4 C. B. (N. S.), COCKBURN, Ch. J., said: "The proprietors of the soil held out an allurement, whereby the plaintiff was induced to come upon the place in question; they held out this road to all persons having occasion to proceed to the asylum as a means of access thereto. Could they have justified the placing an obstruction across the way, whereby an injury was occasioned to one using the way by their invitation? Clearly they could not. Having, so to speak, dedicated the way to such of the general public as might have occasion to use it for that purpose, and having held it out as a safe and convenient mode of access to the establishment, without any reservation, it was not competent to them to place thereon any obstruction calculated to render the road unsafe, and likely to cause injury to those persons to whom they had held it out as a way along which they might safely go." There is a similar adjudication in Chapman *v.* Rothwell, Ell., Bl. & Ell. 168, where the same question was presented.

If, therefore, any one is injured in consequence of the negligence of the proprietor, in this respect, an action for damages can be maintained, even if the unsafe condition of the premises was caused by the act of other parties, and the owner allows them to remain in that condition. As was said by Lord ELLENBOROUGH, in Coupland *v.* Hardingham, 3 Campb. 398, the defendant is liable for the consequences "in the same manner as if he himself had originated the nuisance."

But this principle is qualified and restricted in its application by another which is obviously just and proper. If the defendant, as soon as he is informed of the existence of the nuisance, takes the proper steps to remove it, and, in order to prevent injury to any one, gives warning of the danger by placing a barrier of any sort so that no prudent person would cross it, he is clearly not liable if rash and reckless individuals disregard the intimations of danger thus given. The evidence of defendant on this point is that the steps were broken down on Sun-

DUTY TO GIVE WARNING OF DANGER—EVIDENCE.

day in the afternoon, and that very soon after the occurrence of this accident a rope was extended across at each entrance to the steps, and a light suspended at the top, so as to warn persons of the existence of danger, and that notwithstanding this warning, the plaintiff passed under the rope, and was thus injured by his own recklessness. The whole of this evidence is contradicted by testimony offered on the part of the plaintiff, and these material facts being in dispute, could only be properly determined by the jury. It necessarily follows, from what has been said, that the defendant's first prayer, which denied the right of the plaintiff to recover on the evidence offered in the cause, was properly rejected by the court below. This prayer could only have been granted by assuming the truth of all the evidence offered by the plaintiff, and if the evidence is true, then, when considered in connection with what has been said in regard to the plaintiff's right of transit over the defendant's property, it clearly establishes the right of recovery in the action.

The defendant's first bill of exceptions relates to the admission of the testimony of the witness Gathman, who said that a custom-house officer had directed him to go over the trestle. This evidence ought to have been rejected, and there was error in admitting it. It does not appear that the custom-house officer was an agent or employee of the defendant, who could not, therefore, be affected by any direction given by an unauthorized party. Nor was the direction given to the plaintiff, but to a stranger to the cause.

The evidence of the same witness, in relation to the condition of the steps, is the foundation for the second bill of exceptions. The evidence was properly admitted by the court, as its pertinency to the issue is apparent.

The evidence included in the third bill of exceptions ought not to have been admitted, and there was error in the ruling of the court below in allowing it to be introduced. The witness was asked what sort of a boy was Rose in point of health. The witness had known him many years before when they were at school in Germany. His condition of health many years anterior to the accident could not prove his physical condition when the accident occurred.

The evidence objected to in the fourth bill of exceptions was properly admitted, and this remark applies equally to that in the fifth bill of exceptions. The evidence related to the character and condition of the outlets from the pier, and was pertinent to the issue.

The sixth bill of exceptions, founded on the rejection of the defendant's first prayer, has already been disposed of by what has been said. The defendant desired to offer evidence tending to prove that the steps were constructed for the use of the employees

of said defendant. This evidence was rejected, and this ruling forms the foundation for the defendant's seventh bill of exceptions. The defendant was entitled to have this evidence presented for the consideration of the jury, and there was error in rejecting it.

The defendant's counsel asked the witness Sapp: "Have you any knowledge of any person, during that afternoon, cautioning those who were leaving the ship not to pass up this trestle?" The court ruled that this question was improper, and this ruling, on which the eighth exception is founded, was erroneous. The same remark applies to the ninth exception, founded on the rejection of evidence offered by the defendant and tending to prove what the trestle was constructed for and what use it had been put to before it was condemned. This evidence was relevant to the issue, and tended to enlighten the jury in regard to the matters involved in controversy.

The tenth and last bill of exceptions is founded on the ruling of the court below in granting the plaintiff's third prayer and in refusing to grant the first, fourth, fifth, sixth, and seventh prayers of the defendant.

The third prayer of the plaintiff is objectionable because it ignores a portion of the evidence in the cause which is important and material, and which, if believed by the jury, would destroy the plaintiff's right of action. There is evidence that there was a notice to persons not to use the trestle. Now, a belief in the verity of this evidence would not be inconsistent with a belief in the existence of all the facts recited in the prayer in question. If the prohibition of the defendant extended to the plaintiff, as it must have done, if the jury should find there was such a prohibition, he was there as a trespasser, and certainly not entitled to recover. And yet the prayer ignoring this fact, which might be believed, declared, as matter of law, that he had a right to use the trestle. There was, therefore, error in granting this prayer. The fourth prayer of the defendant, which was rejected after the usual and formal recital of facts not in dispute, informs the jury that if they believe, from the evidence, that at the place where the plaintiff went on the trestle a lamp was burning at night and a sign with words "keep off," the plaintiff cannot recover in this action. From what has been already said, the legal proposition enunciated in this prayer must be recognized as correct in principle, and there was error in the rejection of this prayer. The fifth and sixth prayers of the defendant were properly rejected. The propositions enunciated in these two prayers are identical, and require the plaintiff to prove that the defendant authorized the use of the trestle as a thoroughfare, or by some positive act recognized it as such. This language tended to mislead the jury. It has already been said that a right of transit to and from the pier was implied in the arrangement between the two companies, and that in the absence of

proof that a particular way had been constructed and designated for the purpose of ingress and egress, persons could use any way not prohibited by the defendant. The same remark is applicable to the seventh prayer of the defendant, which was properly rejected.

Because of the errors in the rulings of the court below, which have been indicated, its judgment must be reversed.

Judgment reversed and new trial awarded.

Concerning injuries received around railroad stations, see, generally, Beeson *v.* Chicago, etc., R. Co., 13 Am. & Eng. R. R. Cas. 45; Wheelwright *v.* Boston, etc., R. Co., 16 Ib. 315; Illinois Central R. Co. *v.* Frelka, 18 Ib. 7; Rennecker *v.* South Car. R. Co., 18 Ib. 149; Buenemann *v.* St. Paul, etc., R. Co., 18 Ib. 153; Foss *v.* Chicago, etc., R. Co., 19 Ib. 112; Watson *v.* Wabash, etc., R. Co., 19 Ib. 114; Bennett *v.* L. & N. R. Co., 1 Ib. 71; Stewart *v.* I. & C. N. R. Co., 2 Ib. 497; Langan *v.* St. Louis, etc., R. Co., 3 Ib. 355; Leary *v.* Cleveland, etc., R. Co., 3 Ib. 498; Louisville, etc., R. Co. *v.* Wolff, 5 Ib. 625; St. Louis, etc., R. Co. *v.* Cantrell, 8 Ib. 198; People *v.* McKay, 8 Ib. 205; Johnson *v.* Chicago, etc., R. Co., 8 Ib. 206; Dobiecke *v.* Sharpe, 8 Ib. 485; Balto. & O. R. Co. *v.* Schwindling, 8 Ib. 544.

Defective Station Appointments—Company Liable for Injury to Passengers Occasioned by.—It is the duty of a railway company to keep its station premises in such a state of good repair as will prevent injuries to passengers taking or arriving upon trains. A passenger arriving is still a passenger for a reasonable length of time until he leaves the premises. And a person at the station for the purpose of leaving by a train is also a passenger, although he may not yet have purchased his ticket. Buffett *v.* Troy & Boston R. Co., 40 N. Y. 168.

In McDonald *et ux. v.* The Chicago, etc., R. Co., 26 Iowa 124, an action by husband and wife against a railroad company to recover damages for injuries to the wife caused by defective steps to a platform to which the train had backed, it not being the usual place to get on and off the cars, the court, however, instructed the jury as follows: "If you find that persons could conveniently and safely approach the train where it then stood, but for the defective step, and there was no rule or regulation of the company prohibiting persons from approaching the cars by that way, and that an ordinarily prudent person would have approached the train by that way, the defendant is liable if the accident occurred by reason of the defective step." The jury returned for the plaintiffs a verdict for $2000.

In Beard *v.* Conn. & Pass. R. Co., 48 Vt. 101, the plaintiff was at defendant's depot for the purpose of taking a train. She was injured in attempting to descend stairs which were built and solely used by an express company, but which were on defendant's premises. They were open at the top, and there was nothing to indicate that they were not for the use of passengers. It was *held* that the defendant was responsible for the injury.

In an English case, Davis *v.* The London, etc., R. Co., 2 F. & F. 588, an action against a railway company for an injury sustained through falling down some stairs leading to their station which were not of proper and safe construction and at the time were somewhat wet, dirty, and slippery by reason of the weather, it was *held* that if the fall was occasioned by the defective condition of the stairs, the plaintiff was entitled to recover. Verdict for the plaintiff, £600.

A railway company is bound to provide safe and sufficient platforms for the use of passengers. They must be of sufficient length to afford safe egress from an ordinary train. St. Louis, etc., R. Co. *v.* Cantrell, 37 Ark. 519. And they must not extend so far towards track that passing cars will project over them.

In an action to recover damages for alleged negligence causing the death of "D," plaintiff's testator, evidence tended to show that "D" crossed the track in front of an approaching train to a platform constructed for the accommodation of passengers taking local trains, and after reaching and while standing upon the platform, was struck by a car of the train and killed. The train was an express train which did not stop at the platform. *Held*—

(1) That proof of the construction of the car and platform so that the former projected over the latter was sufficient to make the question of defendant's negligence one of fact;

(2) That the fact that the platform in question was not connected with a depot, but simply for the accommodation of a certain class of passengers, did not exonerate defendants from liability;

(3) That it was not to be assumed without proof that "D" must have known that the platform was for a train which he did not intend to take; and

(4) That "D" had a right to assume that he could stand upon the platform without being exposed to unnecessary hazard or danger. Dobiecki *v.* Sharp, 88 N. Y. 203.

And a platform must be of sufficient width. Chicago & Alton R. Co. *v.* Wilson, 63 Ill. 167.

In this case the railroad, at a point where its passenger trains passed each other, constructed a platform for the convenience of passengers getting on and off their trains, between the main and switch track, about 100 feet long and 5½ feet in width, so that when the trains stood side by side of each other there was between the coaches about 2 feet 2 inches clear space in the middle of the platform. The plaintiff after purchasing a ticket crossed over to the platform for the purpose of taking a train, and whilst either standing or walking slowly on the platform, waiting for the passengers to alight, was struck by a train coming from the opposite direction and passing on the other side of the platform. *Held*, that the construction and use of so narrow a platform was reckless and wanton carelessness and gross negligence.

A railroad company is liable for injuries caused by unfenced holes or pits in station grounds or cavity in platform. Burgess *v.* Railway Co., 95 Eng. Com. Law, 923; Tobin *v.* Portland, etc., R. Co., 59 Me. 183. In the latter case the question was raised as to the liability of railroad companies caused by defects in station platforms to persons other than passengers. It was *held* that a hackman could recover from a railway company for an injury received by stepping without fault into a cavity in the platform negligently left in a defective condition.

The same duty which is upon a railway company to provide safe station appliances for the accommodation of passengers devolves upon it in regard to such persons, not passengers, as are there lawfully to receive friends or to part with leaving friends. Doss *v.* Missouri, etc., R. Co., 59 Mo. 27; s. c., 8 Am. Ry. Rep. 462; Dublin, Wicklow, etc., R. Co. *v.* Slattery, Law Rep. 3 App. Cas. 1155; s. c. Irish Rep., 8 C. L. 531 and 10 Id. 256.

For injuries occasioned by articles standing or lying upon a platform and obstructing or endangering travel over it, the company is liable. Martin *v.* Great Northern Ry. Co., 11 C. B. 179. See, also, Corman *v.* The Eastern Counties R. Co., 4 H. & N. 785.

If a passenger attempts to cross behind a train which blocks up the usual point of exit, and in so doing falls over some object left there, and is injured, the company is liable. Nicholson *v.* Lancashire, etc., Ry. Co., 34 L. J. Exch. 84; Holmes *v.* Northeastern Ry. Co., 38 Id. 161.

A station and its grounds must be lighted sufficiently to enable strangers to safely get upon or leave the premises.

The fact that they are lighted sufficiently for the company's servants and agents is not sufficient. Martin *v.* Great Northern Ry. Co., 16 C. B. 180; Birkett *v.* Whitehaven Junction Ry. Co., 4 H. & N. 730; Carman *v.* Eastern Counties Ry. Co., *supra*.

PENNSYLVANIA CO.

v.

MARION.

(*Advance Case, Indiana. December* 16, 1885.)

In all common law actions, the basis of which is the negligence of the defendant, negligence or its equivalent must be directly averred, or such facts must be stated that a *prima facie* presumption of negligence arises.

Where the plaintiff shows in his complaint that he left the car while it was in motion, without the knowledge or direction of the defendant's employees, an averment that the platform at the station on which he landed was "out of repair," and "was wholly unsuitable for the reception of passengers," does not, as a matter of law, show negligence in the railway company, which, as to such platform, is only held to that reasonable degree of care for the safety and protection of its patrons, having regard to the nature of its business, as is demanded of individuals upon whose premises others come by invitation or inducement, for the transaction of business.

Recovery for services necessary to ameliorate the condition and suffering of the plaintiff may be had, although gratuitously rendered, when a recovery for negligence of defendant can be had.

When the injury occurred in December, evidence of the condition of the platform in the following March is not competent, unless it is shown that its condition was substantially unchanged.

Whether a plaintiff was negligent or not, depended upon the particular facts admitted or satisfactorily proved. If the facts thus established constituted negligence, then, whether it exhibited such conduct as an ordinarily prudent man might reasonably be expected to indulge in or not, it was none the less negligence.

APPEAL from the Owen Circuit Court. Reversed.

Action for personal injury from negligence.

The facts are stated in the opinion.

Samuel O. Pickens for appellant.

Robinson & Fowler for appellee.

MITCHELL, J.—The complaint in this case avers that on December 6, 1882, the plaintiff took passage on one of the defendant's trains at Gosport, in Spencer county, to be carried thence to Mun-
FACTS. day's Station, a regular passenger station on the defendant's line. That about a half mile from the station, which was reached about 11 o'clock A.M., the train on which he was proceeding slacked up so that when it reached the station it was moving at a very slow rate of speed, so that the plaintiff could have alighted therefrom with safety, if there had been a suitable platform or other suitable place prepared for passengers to step upon when leaving the train.

That there was a passenger depot and a platform for passengers

to get on and off trains at Munday's Station, but that the platform had been suffered to get out of repair and wholly unsuitable for the reception of passengers. That it had settled down, or become depressed in the middle, so as to form an inclined plane from the car to the centre of the platform. It is averred that while the train was running at a very slow rate of speed, and without any fault or negligence on his part, the plaintiff stepped upon the platform, without any knowledge of its defective condition, when owing to the inclination in the platform, his feet flew from under him, and he was thrown under the train, from which he suffered injury resulting in the necessity of having his right arm amputated.

The question is presented whether the facts thus stated constitute a cause of action. It is nowhere averred in the complaint, in terms, that the defendant was guilty of any negligence, or that anything was done, or omitted negligently or carelessly. The plaintiff relies upon the facts stated to raise the inference or presumption of negligence, without direct averment; and in this it may be said he has adopted, to say the least, an extremely hazardous method of pleading.

AVERMENT OF NEGLIGENCE—PRIMA FACIE PRESUMPTION.

In all common-law actions, the basis of which is the negligence of the defendant, negligence or its equivalent must be directly averred, or such facts must be stated as that a *prima-facie* presumption of negligence arises.

It must appear from the complaint, either by direct averment or from the statement of such facts as to a certainty raise the presumption that the injury was the result of the defendant's negligence, or that it was purposely committed. B. P. & C. R. Co. *v.* Anderson, 58 Ind. 413, and cases cited; I. P. & C. R. Co. *v.* Brucey, 21 Ind. 215; T. H. & R. Co. *v.* Smith, 19 Ind. 42; Dyer *v.* R., 34 Mo., 127; 2 Thomp. Neg. 1246.

WHETHER FACTS RAISE PRESUMPTION OF NEGLIGENCE.

Do the facts averred raise a presumption of negligence? The plaintiff, having voluntarily left his seat and alighted upon the platform while the train was in motion, is not in a position to claim the benefit of the well-established rule which raises a presumption of negligence in favor of a passenger, who, while conforming to the regulations of the carrier or while passively seated in a car, sustains an injury in consequence of the car being thrown from the track, or other mishap to the train. It is only in cases where the deliberate volition and voluntary action of the passenger are not involved, that such presumption arises. Speaking of this rule it has been said: "It does not apply where the occasion of the hurt of the passenger was an active, voluntary movement on his part, combined with some alleged deficiency in the carrier's means of transportation or accommodation, and the reason is, that in such cases it is necessary to consider whether there may not have been contributory negli-

gence on the part of a passenger. It is only in respect of those accidents which happen to the passenger while he passively trusts himself to the safety of the carrier's means of transportation, or to the skill, diligence, and care of his servants, that the rule applies." Thomp. Car., 214; 2 Wood. Ry., 1000.

Adopting the foregoing statement, we will consider briefly the supposed inculpatory statements contained in the complaint. The only matter of grievance charged is that the defendant suffered its platform at Munday's Station to become out of repair. That it was so depressed in the centre as to incline from that point towards the cars. The extent of this inclination is not averred, nor is it even stated that it rendered its proper and intended use dangerous.

The strongest expression contained in the complaint, implying a disregard of the defendant's duty in respect of its platform is that it was "out of repair," and "wholly unsuitable for the reception of passengers." The only particular in which it was out of repair and unsuitable, as appears from the complaint, was its inclination from the cars towards the centre.

Without more, we are unable to say as matter of law this constituted negligence; especially is this so, when we are asked to infer negligence in favor of the plaintiff, who shows in his complaint that he left the train while it was in motion, and, as we must presume, without the knowledge, consent, or direction of the defendant's employees. To authorize a recovery for an injury so received in any case, the negligence of the carrier ought not to be left to inference, upon an equivocal statement of facts.

DUTY OF RAILROAD COMPANY WITH RESPECT TO PLATFORM AND APPROACHES

While it is the duty of a railroad company to keep its platform and approaches safe and convenient for the ingress and egress of passengers to and from its cars, the rigor of the rule which requires it, out of considerations of public policy, to exercise the highest possible diligence for the benefit of the passenger while in the actual progress of his journey, and holds it responsible for the slightest defect in its machinery, track, and appliances, is measurably relaxed with respect to its platform and approaches. With respect to these, it is to be held to that reasonable degree of care for the safety and protection of its patrons, having regard to the nature of its business, as is demanded of individuals upon whose premises others come by invitation or inducement for the transaction of business. C. W. & M. R. Co. *v.* Peters, 30 Ind. 168; Pendleton Street R. Co. *v.* Shires, 18 Ohio St. 255; Thomp. Car. 104, 209, 214.

That the platform at a station of undisclosed consequence was suffered to get out of exact level, to such an extent only as that nothing more can be said of it than that it was out of repair and unsuitable, without being dangerous, will not authorize a legal presumption of negligence. So long as the approaches and platform

at stations are safe and do not expose persons having occasion to use them to the chance of danger or inconvenience which may occasion hurt to them, it cannot be said that the railroad company is negligent. Whether the platform was "suitable" or not was a matter of opinion, upon which the defendant had a right to its judgment. The law cannot be invoked until its safety becomes a question.

Since it results, from the conclusions already stated, that the judgment of the court below must be reversed, and as the complaint is not questioned in that regard, we need not determine whether upon the facts stated therein the plaintiff was guilty of contributory fault.

For the appellee it is contended that as a right result was reached on the whole case, a reversal should not follow, even if the ruling of the court on the demurrer to the complaint was erroneous.

Where a demurrer is filed to a complaint and overruled, the ruling must stand or fall upon its own merits. We cannot look into the evidence and from that determine whether to reverse or affirm the ruling on the demurrer. Pennsylvania Co. *v.* Poor, 1 West. Rep. 572.

In a case where there are two or more paragraphs in a complaint, if it affirmatively appears from special findings in the case that the verdict was returned upon a good paragraph alone, a judgment will not be reversed because there may have been a bad paragraph also. Martin *v.* Couble, 72 Ind. 67.

The plaintiff having testified that the nurses who attended him, while prostrated from the injury, did so voluntarily and without charge, was nevertheless permitted, over objection, to prove by his attending physician what their services were worth. This evidence was admissible under the rulings in Indianapolis *v.* Gaston, 58 Ind. 224; O. & M. R. W. Co. *v.* Dickerson, 59 Ind. 317.

DAMAGES—VALUE OF SERVICES OF PERSONS ATTENDING INJURED PERSON.

These services were necessary to ameliorate the condition and suffering of the plaintiff. That they were voluntarily and gratuitously rendered, was for his benefit and not for the benefit of the defendant. Klein *v.* Thompson, 19 Ohio St. 569; The D. S. Gregory, 2 Ben. 226; Cunningham *v.* E. T. H. R. Co., 102 Ind.

The injury to the plaintiff occurred on December 6, 1882. The court admitted the evidence of Calvin F. Nation, over the defendant's objection, in which he described the condition of the platform on which the injury occurred, as it was in March following. The witness testified that at that time there was a plank "cupped up" from one-half to five-eighths of an inch at the place where the plaintiff fell. Without evidence that the platform was in substantially the same condition at the time of the injury as at the time to which the testimony related, it was not proper to admit it. Indianapolis *v.* Scott, 72 Ind. 196.

EVIDENCE CONCERNING CONDITION OF PLATFORM.

Nothing of that kind appears in the testimony of Mr. Nation, but the fact may have been shown by other witnesses. It is not important in the present aspect of the case that we examine the evidence to determine this point.

A number of objections are taken to instructions given by the court. Some of the instructions are justly subject to the criticism of being too general in their character. As a rule, we think it may be said that instructions which die with the particular case on trial, by an application of the law to the facts as they may be found in that case, rather than with the statement of general abstract questions of law on the subjects involved, are productive of better results. It is certain there is less liability to error, and it is equally certain that it results in a better comprehension of the case by the jury.

INSTRUCTION CONCERNING LEAVING TRAIN IN MOTION.

That part of the 5th instruction, in which it is said that if, under all the circumstances, the act of leaving the train while in motion was one which an ordinarily prudent man in the exercise of reasonable care might reasonably be expected to do, the law would not regard it as negligent, even though it materially contributed to the injury complained of, was, to say the least, liable to mislead the jury. The formula used is that frequently adopted in attempting to define negligence. Like any other definition or abstract statement, it tended more to confuse than to instruct a jury as to what in any given case may constitute a negligence. Whether the plaintiff was negligent or not, depended upon the particular facts admitted or satisfactorily proved in the case. If the facts thus established constituted negligence, then whether they exhibited such conduct as an ordinarily prudent man might reasonably be expected to indulge in or not, it was none the less negligence. The most prudent men are not always exempt from carelessness, and when actually negligent the law attaches the same consequences to their negligent conduct as to similar conduct in others. In estimating the value or relation of particular facts, it may be well that the jury may consider the conduct of men of ordinary prudence under similar circumstances; but it will not do to say, without regard to what the facts may be, that if the conduct involved is such as a prudent man would or would not have indulged in under the circumstances, then the law pronounces one way or the other on such conduct. It is upon the facts established in each case that in the end the law must declare whether negligence was or was not imputable. P. C. & St. L. R. Co. *v.* Spencer, 98 Ind. 186.

Upon a careful examination of the instructions complained of, we are not prepared to say that any of them, except as already indicated, state the law incorrectly.

While the 6th instruction, relating to the weight to be given to the corroborated evidence of an impeached witness, may be a cor-

rect statement of the law in the abstract, it was nevertheless a question for the jury to determine whether the effect of the corroboration should outweigh the impeachment. Morris *v.* State, 101 Ind. 560, and cases cited.

Whether the motion for a new trial should have been granted, upon the ground of newly-discovered evidence, as prayed for, we do not determine; and whether upon the evidence as set out in their record the verdict was sustained. Since the conclusion reached may result in another trial, it is manifestly better that we express no opinion.

The judgment is reversed with costs, with instruction to the court below to sustain the demurrer to the complaint, with leave to the plaintiff to amend, and for further proceedings.

See Baltimore & Ohio R. Co. *v.* Rose and note, *ante*, p. 125.

KEEFE

v.

BOSTON AND ALBANY R. CO.

(*Advance Case, Massachusetts. July* 8, 1886.)

A passenger started to leave the depot platform at a place not intended for that purpose, with a view of crossing the track at a point where she had no right to cross it. While still on the platform she received an injury caused by the negligence of defendant's servants. *Held*, that the company was liable; that when it provides a platform at its station in such a manner as to invite passengers to walk over it while waiting for trains, or while preparing to leave the station, it is bound to exercise due care towards such passengers while upon the platform.

ACTION of tort for personal injuries. At the trial in the Superior Court, it appeared in evidence that on October 23, 1883, the plaintiff purchased a ticket, at the station of the defendant road in Boston, for a passage to Newton, the residence of the plaintiff, and took a train arriving at Newton at about twenty minutes past six o'clock in the evening. The plaintiff testified that, upon her arrival at Newton, she left the train, walked onto the platform of the defendant's station, at a point opposite the door of the ladies' room, and proceeded directly over and along said platform in a westerly direction for the purpose of reaching her house in Newton; that while so walking along said platform past the westerly shed thereon, she was suddenly struck or thrown from said platform upon the track of the railroad and injured. The evidence was that the plaintiff was struck by or backed against a truck laden with

baggage, which the baggage-master of the defendant road was pulling over said platform. There was also evidence as to the manner in which the platform was lighted at the place of the accident. It appeared that the plaintiff was moving, when hurt, westerly along the platform from the place where she alighted from the train, intending to cross the railroad at a point opposite an alleyway, where there was no planking or prepared crossing on the railroad, and there being no steps for obtaining access to said alleyway from the north side of the railroad.

Upon all the evidence in the case, the court, at the request of the defendant, instructed the jury that there was no evidence on which the plaintiff was entitled to go to the jury, and the jury by direction of the court, returned a verdict for the defendant. The plaintiff alleged exceptions. Except as above given, the case is stated in the opinion.

T. J. Gargan for plaintiff.

A. L. Soule for defendant.

FIELD, J.—The principal contention of the counsel for the defendant is that "as soon as the plaintiff began her progress towards the west, for the purpose of crossing the railroad at a place not intended nor prepared for such use she ceased to have any right to protection as a passenger, because the safe and proper way of egress for passengers was in the opposite direction."

There was evidence that the construction of the platform on the south side of the railroad and the use made of it were such that it was intended by the railroad company to be used by passengers so far as was necessary or convenient for them in entering or leaving. The defendant's engineer testified that the "platform was designed for the accommodation of all the public, who land at the station." The plaintiff cannot be considered as a trespasser or a mere licensee, if immediately on leaving the train she chose to walk over the platform, in the direction she was walking, for the purpose of leaving the platform to go home, if the place where she was walking was fitted up and intended for the use of passengers. If the defendant was under no obligation to furnish such platform, yet if it furnished it and arranged it in such a manner as to invite passengers to walk over it as they found it convenient while waiting for trains or for conveyances to take them from the station, or while preparing to leave the station, it must exercise due care towards passengers found upon it. That the plaintiff intended in her mind, after she left the platform, to cross the railroad at a place where she had no right to cross it is not conclusive against the right of action. She was not necessarily a trespasser or mere licensee when and where she was struck, because she intended afterward to become either one or the other.

PLAINTIFF NOT A TRESPASSER.

The well-known usages of railroad companies and of the public make it impossible to hold, as matter of law, that it was the duty of the plaintiff, immediately on leaving the cars at the station, to take the shortest practicable course to the nearest highway and that if she did not she became a trespasser or licensee only. The defendant was bound to keep in safe condition for its passengers all that part of its station and platforms where passengers were expressly or impliedly invited to go, and was bound, by its servants and agents, to exercise due care towards passengers using its station and platforms by its invitation. The point where the plaintiff intended to cross the railroad is supposed to be the same as that mentioned in Wheelwright *v.* Boston & Albany R. Co., 135 Mass. 225, but whether the plaintiff in crossing would have been a licensee or a trespasser we think is immaterial. The intention in her mind had not become an act of crossing the railroad at a point where she had no right to cross, and she might never have acted in accordance with that intention. She was still a passenger, leaving the station of the railroad, and may have been walking upon a part of the platform intended for the use of passengers.

Whether the plaintiff backed against the truck or was struck by it, whether she or the baggage-master of the defendant, who was pulling the truck, was, under the circumstances, in the exercise of due care, and whether the platform was properly lighted, were questions for the jury.

Exceptions sustained.

International and Great Northern R. Co.

v.

Ormond.

(*Advance Case, Texas.* 1885.)

A passenger on a railway train, after alighting from the car which conveyed him to his point of destination, went forward to the baggage car after he had reached the platform, and, while engaged in assisting the employees of the road in getting out his baggage, was fatally injured by the moving of the train. In a suit for damages brought by the widow, for herself and her infant son, *held:*

1. Whether the deceased had a receipt, bill of lading, or check for his goods, which rendered it unnecessary for him to go to the baggage car after he had been safely delivered at his destination, and whether it was proper, under all the circumstances of the case, for him to enter the car containing his effects, and see in person to their being unloaded, it was the province of the jury to determine.

2. What he should have done was what a prudent man would have done

in the same situation; and what was done, and what should have been done, were both questions for the jury.

When one is injured by an act of negligence, that act proximately contributes to the injury, when without it the injury would not have been inflicted.

See statement of case for a charge of the court which omits the use of technical language in defining the circumstances under which the negligence of the deceased would have prevented a recovery if it was the proximate cause of the injury inflicted.

When one by accident or misadventure falls upon a railway track, without fault on his part, and is then, through the negligence of the company's agents who manage the train, injured, the negligence of the company is not excused.

The keeper of a railroad section house, whose usual earnings had been from fifty-five to one hundred dollars a month, was killed by the negligent conduct of the servants of a railway company in running one of its trains. In an action by the widow and child, for damages resulting, *held:*

1. That no standard by which to estimate damages for negligently killing a man can be fixed by reference to what he was earning when he died. The additional experience and skill which he might acquire in some of the years of life of which he was deprived would increase his wages, and create an element of uncertainty in fixing any arithmetical standard.

2. In the absence of any standard, since the size of the verdict did not show any evidence of passion or prejudice, the verdict for $12,000 could not be pronounced clearly excessive.

APPEAL from Anderson. Tried below before the Hon. F. A. Williams.

The conflicting testimony, and its amount, contained in the lengthy record in this cause, preclude anything but a very general statement of it.

The suit was brought by Mary Ormond for the benefit of herself and her infant son, John Ormond, against the International & Great Northern R. Company, and R. S. Hayes, who was receiver therefor, to recover damages for the death of James Ormond, husband of Mary and father of John Ormond. His death was alleged to have been proximately caused by the negligence of the servants of the receiver, while decedent was a passenger on a train of the defendants. That the receiver transferred to his co-defendant, and it (the International & Great Northern R. Co.) received and was possessed of funds, liable to the payment of any judgment that might be obtained against it, sufficient to satisfy the same. It was agreed that if the receiver was liable, the railroad company was bound to pay the judgment.

R. S. Hayes, as receiver, pleaded in defence:

1st. That, at the time the injury was inflicted, he was acting as receiver, and had since accounted and has been discharged, and has no longer any of the property in his custody or control.

2d. That, at the time of the injury, James Ormond was not a passenger, but was acting in the capacity of a fellow-servant with those who caused his death, if any one caused it.

3d. That James Ormond accidentally fell against the engine and

tender, and such accidental falling caused his death, and that it was a misadventure or accident.

The International & Great Northern R. Co. adopted the plea of R. S. Hayes, and both defendants pleaded not guilty.

Verdict and judgment for Mary Ormond for herself and child for $12,000 against the International & Great Northern R. Co. only.

The evidence showed that the deceased, Ormond, was on the appellant's train by advice, and with a pass from one Cronin, a roadmaster under the receiver, Hayes, and under an agreement with Cronin to have him, his wife, infant child and nurse, with baggage and furniture, put off at a section house near Jacksonville; that they were carried beyond their destination, and put out near the Jacksonville depot late on the evening of an inclement day, the 26th December, 1878, when the weather was cold and the ground covered with sleet and ice; that Mrs. Ormond was lame and walked with difficulty; that Cronin agreed to deliver the freight at the section house, which was not done.

There was evidence tending to show that, at the time of the injury, the engine was managed by a fireman, and running through the streets of a town without signals or sound of danger; that deceased had no check, or bill of lading, for his baggage; that after reaching the place where he must leave the train, he entered the baggage car to look after his baggage, to identify and supervise its safe delivery; that the car was not on the track where it should have been, and was run too fast without the bell being rung or other danger signal given; that, under these circumstances, the deceased fell or was pushed from the car door when looking after his baggage, and was run over and killed by the tender and engine being backed rapidly by the fireman.

The evidence showed that the plaintiff and child were wholly dependent on the deceased for the means of support, and that he was a healthy and industrious man, who earned from fifty-five to one hundred dollars a month.

The court, among other things, charged the jury as follows:

"If Ormond, his wife and child, were received upon one of the trains under the control of the receiver or his servants, to be carried to some point, then they were passengers, and would continue such at least until they had been carried to their point of destination, and had safely alighted from the train upon which they had been carried, and in addition to such length of time, if their baggage had been received on such train for carriage to the same place, and no receipt, bill of lading, check, or other like evidence had been delivered to him for it; and if it was for this reason proper, under the circumstances, for him to go to the car where such baggage was stored for the purpose of identifying and claiming his property and receiving it from the employees on the train,

then he had the right to do so subject to rules hereinafter given as to the effect of any negligence of which he himself may have been guilty. And he would continue to occupy to the receiver the relation of passenger, so long as he did nothing more than just indicated, and to aid and assist the servants in identifying and removing his own baggage from the car to the platform.

"But if there were no such facts as just explained to continue the relations, he and his family would cease to be passengers when they had arrived at the point of their destination and had safely alighted from the cars. And if Ormond, after he had safely alighted from the train with his family, without the existence of any such facts as are above supposed to render it necessary or proper for him to do so, went into a box car to aid and assist the men there employed in getting out his goods, without the existence of any necessity or propriety therefor, and while so assisting was killed, then he made himself a fellow-servant for the time being with the conductor, engineer and fireman on the train; and if, under such circumstances, he was killed through the negligence of some or all of them, no recovery could be had therefor."

The court, in the charge as to what sort of negligence would proximately contribute to the death, gave the following: "If a negligent act or omission of his (Ormond's) so far contributed directly and naturally to his death as that but for it *he would not have been killed*, then the defendant (the railroad company) would be entitled to your verdict, though there had been negligence on the part of the servants of the receiver;" and refused appellant the fourth special charge requested on this subject. The fourth special charge requested was as follows: "Gentlemen: If you find that the negligence of the employees, *in part*, proximately contributed to cause Mr. Ormond's injury and death, *and* that the negligence of said Mr. Ormond *also* proximately contributed thereto, then the plaintiff cannot recover in this suit."

J. Y. Gooch for appellant.

Marsh Glenn and *J. J. Word* for appellee.

ROBERTSON, A. J.—Whether James Ormond, after he had alighted from the car in which he, his wife, child and nurse had been transported from Palestine to Jacksonville, was guilty of any negligence in going forward to the box-car containing his household effects, is a mixed question of law and fact, and in the clear and well-arranged charge of the court below was properly submitted to the jury. The jury were authorized under the testimony to conclude, as from the verdict they must have done, that Ormond had no receipt, bill of lading or check for his goods, and whether it was proper, under all the circumstances, for him to go to the car containing his effects and see in person that they were unloaded, it was the province of

NEGLIGENCE IN GOING FORWARD TO BAGGAGE CAR A QUESTION FOR JURY.

the jury to determine. What he should have done, under the circumstances, is what a prudent man would have done in the same situation; and what was done, and what should have been done, were both questions for the jury. T. & P. Ry. Co. *v.* Murphy, 46 Tex. 356.

The authorities all agree that plaintiff could not recover if the negligence of James Ormond proximately contributed to his death. This expression does not convey to the unprofessional mind a sufficiently definite idea. The act of negligence proximately contributes to the injury when, without the act of negligence, the injury would not have been inflicted. Wood's Master and Servant, p. 638.

The court below did not err in the general charge, in submitting this issue, in eschewing the technical expression. The charge correctly lays down the rule in language intelligible to the jury.

As much of the special charge quoted in the fifth assignment of error as ought have been given was embraced in the general charge. The effect of the charge requested was, that if Jas. Ormond's fall, caused "by accident or misadventure," contributed to his death, the plaintiff could not recover. Without the fall the injury would not have occurred. But if he was not at fault in falling, the negligence effecting his death is not excused. This is the theory of the general charge, and is correct.

The sixth, seventh and eighth assignments of error relate to the insufficiency of the evidence to sustain the verdict. The testimony is too voluminous to be discussed in much detail. It must suffice to say that there is a conflict of testimony on every material point. Whether Jas. Ormond was drunk or sober, and whether he had a receipt, bill of lading or check for his goods, were questions pertinent in determining whether he was guilty of negligence in entering the car from which he fell; whether the car containing his goods should have been on the main track or the switch; whether the gangplank should have been used in unloading; whether it was prudent to allow the fireman to run the engine back on the switch while the car on the main track was being unloaded; whether the engine was thus run too fast; whether the bell was rung or other proper signals given, were all questions upon which there was more or less conflict of testimony. The jury have solved these questions by a finding, the logical result of which is, that Jas. Ormond was properly in the car he fell from, and that the engine and truck, contact with one of which produced his death, were improperly there at all, or there without sufficient warning, or in too rapid motion. To sustain these conclusions there is neither such want of evidence nor such decided preponderance against them as will justify the reversal of the judgment on these assignments of error.

FINDING OF JURY —SUFFICIENCY OF EVIDENCE.

The appellant does not complain of the charge of the court be-

low on the measure of damages, nor does the record disclose any influence exciting the jury to passion or prejudice. A former jury in the same case rendered a larger verdict and another judge refused to disturb it. Ry. Co. *v.* Ormond, 62 Tex. 274. Taking into consideration the age, life, expectancy and earnings of the deceased at the date of his death, an easy calculation, such as that suggested by appellant's counsel, would yield a much smaller sum than that awarded by the verdict. But the additional experience and skill which may have been acquired in some of the years of life he was deprived of would increase his wages, and this element of uncertainty deprives us of the arithmetical standard suggested in appellant's brief. And in the absence of any standard, where the record or the very size of the verdict does not show passion or prejudice, we cannot determine that the verdict is clearly excessive.

MEASURE OF DAMAGES.

Execution is properly awarded in favor of appellee for the whole amount of the judgment, but the court ought to have ordered that the sheriff should retain one-half of all moneys collected, outside of the costs, until a guardian of the estate of John Ormond, a minor, has qualified, and should pay over the sum retained to such guardian. The judgment of the court below will be re-formed in this particular, and in all else it will be affirmed.

Judgment re-formed.

What Deceased was Earning No Standard by which to Estimate Damages.—East Tenn., etc., R. Co. *v.* White, 8 Am. & Eng. R. R. Cas. 65, but see Market St. R. Co. *v.* McKeever, 19 Ib. 128.

TEXAS AND PACIFIC R. CO.

v.

COLE.

(*Advance Case, Texas. October* 29, 1886.)

A person was put off a railroad train at the wrong station, at night, through negligence of the company in selling tickets to a point on its line at which its trains did not stop. The person failed to make any inquiry for a place to find shelter, when he might have found it upon inquiry. There were no houses or lights in sight, known to him, and the agent closed the depot almost immediately upon his arrival. *Held*, that by walking to his destination, instead of trying to find shelter, he contributed to his own injury, and was not entitled to recover.

APPEAL from Cass county.

Action for damages. Plaintiff had judgment below, and defendant appealed.

F. H. Prendergast for appellant.

WILLIE, C. J.—Mrs. Cole, wife of the appellee, boarded a train of appellant at Queen City, a station on the Texas & Pacific R., having a ticket entitling her to be carried to Galloway, another station on the same road, and to be there delivered in safety. Mrs. Cole carried an infant in her arms, and was accompanied by her husband's brother, and by her step-daughter, 14 years of age. The conductor refused to stop the train at Galloway, but carried Mrs. Cole and her companions to Wayne, a station two miles beyond Galloway, where they alighted from the train. It was 12 o'clock at night when they reached Wayne, and the weather was cold, and the ground frozen. Upon their arrival at Wayne, they started to go into the depot house, when the railroad agent there told them that it was time to shut up, closed the door, and left. Neither Mrs. Cole, nor any one with her, asked the agent if there was a place in Wayne where they could stay during the night; and, seeing no lights or houses, she and her companions walked the railroad track back to Galloway. It was for the mental and physical suffering caused thereby that damages were sought to be recovered in this suit. FACTS.

The defence proved by the sheriff of Cass county, in which Wayne station is situated, that there were at that place a mill, a boarding-house, three stores, three or four residences, and a number of saloons, in which the mill hands lived. The boarding-house was intended for the mill hands, but the sheriff stated that he has stopped there and got his meals. The plaintiff recovered a judgment for $750, of which $350 was afterwards remitted, and the defendant has appealed to this court.

Two objections are urged to the judgment: *First.* It is said that the damages claimed and recovered by the plaintiff resulted from Mrs. Cole's own imprudence and negligence, and that she contributed to her own injury by walking two miles on a cold night; and that she did this of her own accord, and not by reason of the act of the defendant in carrying her beyond her place of destination. *Second.* It is claimed that the damages given by the jury were excessive, and that this could not be cured by a *remittitur*.

In the view we take of the case, it will not be necessary to consider the second question raised by the appellant. That the walk from Wayne to Galloway was the immediate cause of Mrs. Cole's injuries is not doubted. Hence her right to recover damages on this account depends upon whether or not it was an act of ordinary care on her part to attempt this walk, under the circumstances. Whatever course ordinary care would dictate we must presume the conductor supposed she would pursue, and for whatever injury resulting to her, notwithstanding she used such care, the appellant is liable. Wayne must have been a station of some importance. A telegraph office was kept there, CONTRIBUTORY NEGLIGENCE IN WALKING BACK TO RIGHT STATION.

and both day and night trains stopped at the place. It was a small town, with stores, dwelling-houses, and a boarding-house, at which at least one person from a distance had been entertained. Had there been a hotel there, known to Mrs. Cole, her conduct in choosing to walk back to Galloway on so intensely cold a night, instead of seeking lodgings at the hotel, would have been inexcusable. Any injury she thereby received would be charged to her own negligence. The same rule would hold good if there was a boarding-house there which she knew had accommodated travellers; for she could have concluded that she could be sheltered there, especially in view of her uncomfortable condition. There was no hotel at Wayne, and no boarding-house known to Mrs. Cole; but this latter fact did not excuse the course she pursued, because she made no use of the means in her power to find out whether or not there was a place at the station where she could obtain lodging for the night. If there was no such place, and the inquiry, therefore, would have been fruitless, or if there was no one of whom she could make the inquiry, there would have been some excuse for her conduct. But there was a house there at which she could probably have obtained lodging; and the depot agent, of whom she could have made the necessary inquiries, was there, and in her presence, and yet she said nothing to him about the subject. She did not, therefore, use the means in her power of saving herself the uncomfortable walk back to Galloway.

The appellant's first breach of duty towards Mrs. Cole was in selling her a ticket to Galloway when the train did not stop at that place. This was the foundation upon which her right to recovery rested. The appellant's next duty, after finding it impossible to put her off at Galloway, was to leave her at the nearest station where she could obtain comfortable accommodations, and from which she could be returned, with the least delay, to Galloway. International & G. N. R. *v.* Gilbert 64 Tex. 536. There is nothing to show that this was not done; in fact, the proof reasonably establishes that this duty was performed. Here her duty towards the company commenced. This was to use ordinary care to prevent injuries to herself greater than the situation demanded. As the night was very cold, and the ground frozen, ordinary care dictated that she should obtain lodging at Wayne, if possible, and not risk a walk of two miles back to Galloway, attended, as it must be, with discomfort and danger to the health of herself and child. Yet she took no steps to find out if she could get quarters for the night at Wayne, but, on the contrary assumption that she could not, undertook the uncomfortable journey; and she, and not the railroad company, must bear the consequences of her choice.

This case differs in all material respects from that of International & G. N. R. *v.* Gilbert, 64 Tex. 536. There the conductor, in an insulting manner, ejected a female travelling without

a protector from the train; putting her off in the swamp of a river, where no accommodations which she was bound to accept could be obtained. She made proper inquiries, found out her situation, and had every reason to believe that she was in danger of bodily harm if she remained. Her fright caused her to return to the nearest safe and comfortable place of which she had any knowledge. Here the plaintiff was under the protection of a male companion. She was at a place where, upon inquiry, she would probably have found comfortable lodging—at least she had no right to assume the contrary—yet she asked no questions as to whether she could be thus accommodated; she chose to walk a long distance at night, in severe weather, to the place of her original destination, rather than seek comfortable quarters at the place where she left the train. We think the point is well taken that the injuries for which damages were sought and recovered below were proximately caused by her own negligence.

The views expressed in this opinion will be found fully sustained by the following among other authorities: Cooley, Torts, 674; Lewis *v.* R. Co., 18 Am. & Eng. R. R. Cas. 263; and authorities cited in opinion and notes; R. Co. *v.* Eaton, Id. 254, and authorities cited.

Because the verdict is against the evidence in the matter indicated, the judgment is reversed and the cause remanded.

Injury to Passenger Walking Back after being Carried Beyond Station.—A railway passenger was, through no fault of his own, carried some distance beyond his station, and there put off the train, and in going back to the station, fell through a cattle-guard or trestle and was injured. *Held*, that he may recover damages from the company. In such a case the injury received is not the remote consequence of the wrong done by the company in carrying him beyond the station and putting him off at a point beyond where he was entitled to get off; but is the natural and proximate consequence of the wrong done in carrying him to the point beyond the station. The court say: "If a railway carrier, instead of discharging his passenger at the place of destination called for by the contract of carriage, lands him at another place from which he cannot reach the place of destination by any practicable route without encountering a serious danger, and the passenger immediately thereafter, proceeding by the only practicable route to the place of destination, without fault or negligence on his part, encounters such danger and is hut, we have no difficulty in saying that the hurt is a proximate consequence of the wrong done by the carrier. A prudent carrier would foresee such danger to the passenger and should, we think, be held bound to foresee it and to answer the consequences of it. On this point the case is governed by the ruling made by this court in Evans *v.* St. Louis, Iron Mountain, etc., R. Co., 11 Mo. App. 463, 471."

Winkler *v.* St. Louis, Iron Mountain & S. R. Co. (St. Louis Ct. of Appeals, February, 1886), 3 Western Reptr., 433.

See also Terre Haute, etc., R. Co. *v.* Buck, 18 Am. & Eng. R. R. Cas. 234; St. Louis, etc., R. Co. *v.* Marshall, 18 Ib. 248; McClelland *v.* Louisville, etc., R. Co. 18 Ib. 260; Lewis *v.* Flint, etc., R. Co. 18 Ib. 263; Brown *v.* Chicago, etc., R. Co. 8 Ib. 444.

INTERNATIONAL AND GREAT NORTHERN R. Co.

v.

SMITH AND WIFE.

(*Advance Case, Texas. October* 19, 1886.

The plaintiff, a lady passenger, was on the wrong train by her mistake and the fault of the defendant's agent. She was unwilling to pay her fare for being carried further on the train, when her mistake was discovered, and was put off at night at a lonely place. Owing to her surroundings, she was afraid to remain there until the arrival of the return train. She walked back to the next station, receiving severe injuries, and suffering from fright. At the trial a verdict for $8,000 damages was rendered. *Held*,

1. That the defendant was not entitled to have the jury instructed that if plaintiff was a trespasser, and refused to pay fare, she could be put off at any station, if plaintiff's uncontradicted testimony shows that she was on the train by an innocent and natural mistake.

2. That the plaintiff was not precluded from recovering by the fact that she refused to be carried further on the train, or to remain at the place where she was put off.

3. That the verdict was not excessive.

A charge which, as far as it goes, gives the law, is not objectionable upon the ground of not setting forth with sufficient fulness the conditions under which the verdict should be for defendant, or upon the ground of not entering sufficiently into the particulars which distinguish remote from proximate causes, if special charges are not asked for upon these matters.

APPEAL from Gregg county.

Action brought by the appellees against the appellant for damages for putting the female plaintiff off defendant's train. The allegations of the plaintiff's petition, which were supported by the evidence, were to the effect that the female plaintiff was travelling with two infant children and her sister from Alabama to Terrell, Texas; that she had a ticket issued by the Texas & Pacific R. Co. entitling her to go to Terrell by way of Longview Junction; that the Texas & Pacific R. Co. formed a connection at Longview Junction with the defendant's railroad; that there the train on which she was travelling was added to a train of the defendant company, which went in another direction than to Terrell; that she asked the conductor, who was an employee of defendant company if she was on the right train, and he told her to keep her seat; that she did so, and, after leaving Longview Junction, the conductor came round for tickets, and, after looking at the tickets of herself and her sister, told them they were on the wrong train; used insulting language to them; had the train slowed up, and put them off at an abandoned saw-mill site, not a regular station; that it was night, and dark; that only a few

people, principally negroes, lived there, and, being afraid to stay there, she and her sister, with the children, walked back to Longview Junction, four or five miles, through a swamp, and over a railroad bridge, and she suffered greatly from fatigue and fright.

Defendant's answer set up, among other things, that plaintiff was offered the opportunity to go to Troupe, and from there to Mineola, by paying passage only from Troupe to Mineola, where she would again be on the Texas & Pacific Railway, or to take the return train on the defendant's road, from the point where she got off, back to Longview Junction, without paying anything. There was a demurrer to the petition, which was overruled, and the jury returned a verdict for plaintiff for $8,000. Defendant appealed from the judgment on the verdict.

Taylor & Morrison and *F. B. Sexton* for appellant.

T. M. Campbell, John M. Duncan and *W. B. Wynne* for appellees.

WILLIE, C. J.—The pleadings, evidence, and charge of the court in this suit are substantially the same as in the case of International & G. N. R. *v.* Gilbert, 64 Tex. 536, both cases having arisen out of the same occurrence. As the rulings of the court below upon the appellant's demurrers, as also the charge of the court in this case, are in accordance with that decision, with which we are content, they furnish no ground for reversing the present judgment.

The remarks of the special judge who tried this case, complained of in the tenth assignment of error, were directed to the demurrers, and not to the evidence to be introduced, upon which latter alone the judgment of the jury could be exercised. We are at a loss to know how a remark to the effect that all the questions raised by the demurrer had been settled by the Supreme Court in a companion case, where the pleadings were substantially the same as those in the case on trial, could influence the verdict of the jury. With the pleadings the jury had nothing to do, except to apply the evidence to them, and ascertain whether the case made by them had been proved by evidence. In doing this they could not be affected in the least by any remark to the effect that the pleadings were in themselves sufficient.

As to the eleventh assignment of error, it is enough to say that, if the appellant's counsel wished to avail themselves of an objection to the language of opposite counsel in addressing the jury, their objections should have been presented in a motion for a new trial. International & G. N. R. *v.* Irvine, 64 Tex. 535. This was not done. The assignment is not, therefore, before us for consideration.

The charge of the court, as we have stated, was sanctioned by us in the Gilbert case. If the appellant thought that the charge

did not set forth with sufficient fulness the conditions under which the verdict should should have been for the defendants, or if it did not enter sufficiently into the particulars which distinguish remote from proximate causes, special charges should have been asked upon these matters. This was not done, and the charge, being the law so far as it went, furnishes no reason for reversing the judgment.

PLAINTIFF NOT A TRESPASSER ON THE TRAIN.

The court properly refused the special charges that were asked. There was no proof showing that Mrs. Smith remained on the car at Longview for the purpose of getting passage without paying for it. According to her evidence, she thought she was entitled to ride on the car under the ticket she held. There is nothing in the defendant's evidence showing that she knew to the contrary before reaching Fort's Mill, the place where she left the train. The conductor of the train had no recollection of the circumstance at all, and no witness for the defence saw the plaintiff till she arrived at Fort's Mill. That this place was uncomfortable, unsuited for the accommodation of the plaintiff, and calculated to arouse her fears for the safety of herself and children, and that she was actually so frightened, abundantly appears from her testimony. If, therefore, the judge had charged that if she was a trespasser on the train, and refused to pay fare, she could be put off at any station, the jury might have understood him as saying that, though the plaintiff was on the train through an innocent mistake and one liable to be made under the circumstances, she could rightfully be put off at any hour of the night, and at any station, no matter how uncomfortable and apparently dangerous to her safety it might be to leave her there. To state this proposition is to show that it is not law. The charge of the court upon the subject was correct, as we have held, and gave the law applicable to the facts before the jury.

PLAINTIFF'S CONDUCT APPROVED.

If we understand the second special instruction asked, that, too, was properly refused. There is no conflict in the evidence as to the alarm caused to the plaintiff by the appearance of things at Fort's Mill, and that she thought it dangerous to remain with the negroes, who seemed to be the only persons residing there. She was not bound to wait for a return train, if she had reason to believe that she or her children would be endangered by so doing. That she was not bound to go to Troupe, and there take passage to Mineola, and pay for it, we, in effect, held, by approving the charge in the Gilbert case. Yet this special charge would have prevented a recovery of the full amount of damages to which she was entitled, if she refused to go to Troupe, and pay her fare from there to Mineola, or if she refused to stay with the negroes at Fort's Mill till a train going to Longview should pass that place. The charge, we think, gave the law upon this subject as adapted to the facts of the case.

We know of no authority for a party to rely upon a promise of the district judge to charge a principle of law, instead of framing a special charge himself, and asking the judge to submit it to the jury. We know of no way in which such a matter can be brought before us as ground for reversal, except upon bill of exceptions prepared in the manner provided in the statute. Rules 53, 54, 55, of District Court, 47 Tex. 626, 627. This the appellant has not done.

The twenty-second assignment is not well taken.

As to the excessiveness of the verdict, we deem it necessary only to refer to what was said in the Gilbert case, without repeating the language used. It is applicable to the present appeal also. We did not, in that case, deem a verdict for $6,500 so excessive as to require that it be set aside. In this $8,000 was allowed the appellees. Mrs. Smith's physical suffering seems to have lasted longer than that of her sister, Mrs. Gilbert. Her mental anguish must also have been greater, as, in addition to her own safety, she was alarmed also for that of her helpless children. Danger to them must have caused greater mental agony to a mother than it possibly could have caused to one more distantly related. The jury have said that it required $8,000 to compensate her, and we cannot say that less would have been sufficient.

EXCESSIVE DAMAGES.

There is no error in the judgment, and it is affirmed.

See Texas & Pacific R. Co. *v.* Cole, *ante*, p. 144.

North Hudson County R. Co.

v.

May.

(*Advance Case, New Jersey. July* 19, 1886.)

The plaintiff was riding on a horse-car of the defendant. The car inside was full of passengers, and the platform on which plaintiff was riding was crowded and also the rear platform was full. He stood on the front platform, holding on, when the violence of the sudden jerk, caused by the driver whipping his horses, threw him off the car. The plaintiff was sworn and gave evidence in the cause. The company called witnesses and introduced evidence to contradict testimony of the plaintiff. The president of the company was not allowed to give in evidence a statement made in writing by the conductor of the car after the accident. In an action to recover it was *held*—

1. That it was not error to refuse to nonsuit.

2. That a corporation being a collection of individuals, acting through its officers and agents, who are admitted to testify in cases where the corporation is a party, cannot be said to be under legal disability, and the opposing party in a suit can be examined as a witness.

3. That the written statement made by the conductor of the car, in the line of his duty, giving details of the accident immediately after it happened, was not admissible in evidence, but the facts must be proved by the conductor or others who witnessed the occurrence.

4. That if the conductor be sworn he may use the written statement to refresh his memory.

ERROR to review a judgment for plaintiff in an action for personal injuries caused by negligence. Affirmed.

The facts are stated in the opinion.

J. C. Besson and *J. B. Vredenburgh* for plaintiff in error.

M. T. Newbold for defendant in error.

PARKER, J.—John May brought suit againt the North Hudson County R. Co., for damages resulting from personal injuries received by him, caused by the alleged negligence of said company. The trial resulted in a verdict for the plaintiff and judgment was entered thereon.

The first error assigned is, that the court admitted the plaintiff below to be sworn and give evidence in the cause. It is contended that the plaintiff in error, a corporation aggregate, being only an artificial person, incapable of speaking and giving testimony, the opposing party cannot be permitted to testify, because of the provision of the statute which provides that no party shall be sworn where the opposite party is prohibited by any legal disability from being sworn as a witness.

OFFICERS AND AGENTS OF CORPORATION ADMITTED TO TESTIFY.

It is true that a corporation is an artificial being, invisible and intangible; but it is a collection of individuals united in one body, acting and speaking through its officers and agents. Since the law which enacts that interest in the event shall not disqualify a witness, the officers and agents as well as stockholders are admitted to testify. So long as they are admitted as witnesses, the corporation cannot be said to be under legal disability.

The court was right in admitting May as a witness.

EVIDENCE TO SUSTAIN MOTION TO NONSUIT.

The next error assigned is the refusal of the court to nonsuit. When the plaintiff in the suit rested, it appeared from the testimony that he was at the time of the accident riding on a horse-car of the company, and was thrown off in consequence of the sudden starting of the car by the driver. It also appeared that the car inside was full of passengers; that the platform on which May was riding was crowded, and also that the rear platform was full. It also appeared that he stood on the front platform holding on, when the violence of the sudden jerk caused by the driver whipping his horses threw him off the car. It further appeared that May was riding as a passenger on defendant's car in the only place he could find. The driver had received him as a passenger and was bound to exercise care towards him, so as to

carry him safely. When the case was rested on the part of May, it had been proved that the company was negligent in starting the car suddenly with force and speed sufficient to throw him off the platform, and there was no evidence that May had contributed to the accident.

The court did right in refusing to nonsuit.

After the motion to nonsuit was refused, the company proceeded to call witnesses and introduce evidence to contradict the testimony which had been given as to the negligence of the company, and also to prove negligence on the part of May. Witnesses swore that May was not on the car when the accident occurred, but at the time was trying to get on the car, while it was in motion; also that the driver did not whip the horses to start the car.

The case was submitted to the jury upon the evidence produced on both sides, which was contradictory. The motion to nonsuit was not renewed, nor was the court asked to instruct the jury to find for the company. Under the circumstances, the refusal to nonsuit, if wrong, cannot now be taken advantage of. The case was tried on its merits and the jury gave credence to the testimony offered on the part of May. Upon writ of error the court will not set aside the judgment, even if it be thought that the verdict was against the weight of evidence. There must be some error in the instructions to the jury by the court, or in refusing to charge, or in the admission or rejection of evidence at the trial, to justify a reversal.

The next error assigned is that the court refused to receive in evidence a statement made by the conductor of the car, reduced to writing by the president of the company, the morning after the accident. When the paper was offered in evidence the court asked counsel in what view of the case he thought the evidence competent; to which question answer was made that the offer of the paper was as a statement made immediately after the accident by a person in performance of his duty. The court did right in refusing to admit the paper in evidence. The conductor was a witness and could have given his version of what was said and done under oath. He might, perhaps, have used the written statement made through his dictation in his presence to refresh his memory; but the paper itself was not legal evidence. It was not made under oath, and if it turned out that the statement was not true an indictment for perjury would not lie.

STATEMENT MADE BY CONDUCTOR AS EVIDENCE.

The remaining assignments of error are to the charge of the court. One complaint is that the judge did not charge the jury that if May was guilty of negligence, the verdict should be for the company. The court did so charge in substance. In his charge the judge said: "In stating the rule that injury resulting from negligence of one in the performance of duty is actionable and must be paid for in damages, an important phase

CHARGE TO JURY

of this rule must be emphasized: and that is, that whenever the plaintiff has himself, in any essential degree, by his own negligence, contributed to the injury there can be no recovery." And again: "If the plaintiff was in the act of boarding a passenger car, it failing to stop on his signal, and by that means he became entangled and suffered injury, my instruction to you is, that was an act of contributory negligence in him such as would defeat his recovery." No language could be more emphatic.

In every respect complained of the charge was legally correct, very carefully worded, and stated the case fairly, leaving to the jury to decide upon the conflicting evidence.

The judgment should be affirmed.

Injury to Passenger while Riding on Street-Car Platform.—See Fleck *v.* Union R. Co., 16 Am. & Eng. R. R. Cas. 372; Germantown P. R. Co. *v.* Walling, 2 Ib. 20; Wells *v.* Lynn & B. R. Co., 2 Ib. 27; 13th, etc., St. Pass. R. Co. *v.* Boudrou, 2 Ib. 30; Nolan *v.* Brooklyn, etc., R. Co., 3 Ib. 463; Downie *v.* Hendry, 8 Ib. 386.

BARTHOLOMEW

v.

NEW YORK CENTRAL AND HUDSON RIVER R. Co.

(*Advance Case, New York. June* 1, 1886.)

A passenger in a railroad car, in obedience to a trainman's call to "change cars," and after the car, on arriving at a station, had so nearly stopped that it appeared to persons of ordinary intelligence and observation to have fully stopped, rose and walked towards the exit. He was thrown down and injured by a sudden jerk of the car. *Held*, that he was not chargeable with contributive negligence, and may recover damages for injuries received.

APPEAL from an order of the Supreme Court at General Term in the Fifth Department, affirming an order denying defendant's motion for a new trial, and from a judgment in favor of plaintiff in an action brought to recover damages for personal injuries. Affirmed.

Memorandum of decision below, 34 Hun, 624.

The facts are sufficiently stated in the opinion.

Edward Harris, for appellant.

Wm. S. Oliver, for respondent.

EARL, J.—The only ground of error alleged by the defendant is the exception taken to the following phrase in the judge's charge: "If the train appeared to have stopped, then, for all practical purposes and for the consideration of this case it had stopped."

This phrase was followed and explained by this language: "If from the evidence you shall say that when this woman stepped out upon the platform the train had stopped or appeared to persons of ordinary intelligence and observation to have stopped, following, as it did, the conceded announcement, the fact that an announcement had been made that the station had been approached, and by a sudden jerk, of which she had no warning, she was precipitated and received this injury, she has a right of action."

There was no error in the portion of the charge excepted to. The plaintiff was in a strange place in the night time, and upon her inquiry, as the train neared Rochester, the conductor informed her that she must change cars at the first place at which the train would stop; that "Rochester" would be called, and she must take the second right-hand train.

Some time after this the brakeman called "Rochester; change cars." The train was then either stopped, or slowed down so that to her, in the inside of the car, it appeared to have stopped. She was bound to act upon appearances, and after making the announcement, if the train was run so slow as to appear to a person of ordinary intelligence and observation to have stopped, ordinary care for the safety of the passengers required the train to be so run and managed as not to endanger their lives; and a sudden jerk or start, without any warning, when the passengers were upon their feet moving toward the platform of the cars, was sufficient evidence of carelessness to impose liability upon the defendant. As to any one in the cars, when the train appeared to have stopped it was the same as if it had stopped, and the same duty rested upon the defendant to care for the safety of the passengers.

The judgment should be affirmed, with costs.

All concur.

SOLOMON, Admnx.,

v.

MANHATTAN R. Co.

(*Advance Case, New York. November* 23, 1886.)

The deceased was well acquainted with the defendant's station and its surroundings and the manner of operating the trains. He endeavored, together with two other persons, to board an elevated railway train after it had begun to move from the station. The two other persons, who were slightly in advance of deceased, either pushed back the car platform gate or it was drawn back for them by the conductor, the gate having either been closed or was then being closed by the conductor, and succeeded in boarding

the train. Deceased took hold of the stanchions of the car, placed one foot on the platform, and was in the act of passing onto the car, when the conductor closed the gate, and deceased, clinging to the car, was carried a few feet until he came in contact with a projection from the station platform, and received injuries from which he died. In an action to recover damages for the death of plaintiff's intestate, it was *held* that deceased was guilty of contributory negligence, and that a nonsuit was properly directed.

The presumption of negligence in the case of one attempting to board a moving train is stronger even than in the case of one attempting to alight from a moving train.

APPEAL from a judgment of the Supreme Court at General Term in the First Department, affirming a judgment of the Circuit Court dismissing the complaint in an action to recover for the death of plaintiff's intestate, alleged to have been caused by negligence of defendant in operating an elevated railway in the city of New York. Affirmed.

The action has been twice tried. Upon the first trial plaintiff obtained a verdict. Upon appeal the General Term reversed the judgment in her favor for error of law, such error being the refusal to nonsuit the plaintiff or to direct a verdict for defendant. 31 Hun. 5.

From this order plaintiff appealed to the Court of Appeals, and the appeal was dismissed. 95 N. Y. 672.

Upon a second trial the complaint was dismissed, and the judgment in defendant's favor was affirmed by the General Term, for the reason that the evidence presented by both parties was similar to that given on the former trial of the cause.

From this judgment of the General Term plaintiff appealed to this court.

The facts of the case are sufficiently stated in the opinion.

Geo. Putnam Smith for appellant.

Edward S. Rapallo, with whom was *Robert E. Deyo*, for respondent.

ANDREWS, J.—It is undisputed that the train was in motion at the time the plaintiff's intestate attempted to enter it. It had been brought to a stop, according to the usual custom, on reaching the Chatham Square station, for the purpose of discharging and receiving passengers, and had started again before the deceased and the two men in front of him, hurrying from the Third Avenue train across the bridge and down the steps to the station platform of the Second avenue road, had reached the rear of the first car. It is also undisputed that the conductor, who was standing on the platform between the first and second cars, had given the signal to start the train, and had closed or attempted to close the gate before the first of the three men reached the car. The train at this time, as we have said, had started and was slowly

FACTS.

moving, but with a constantly accelerated speed. The two men in advance of the intestate succeeded in safely boarding the train. The intestate was a few feet behind them. He attempted to get onto the platform of the car after the others.

The evidence tends to show that he took hold of the stanchions of the car with both hands and placed one foot upon the car platform, and was in the act of passing onto the car when the conductor closed the gate against the deceased, who, clinging to the car or possibly being caught in some way by the gate, was carried along a few feet, until his body came in contact with a water pipe extending horizontally at the end of the station platform, and received the injuries of which he subsequently died.

There is a conflict of evidence as to whether the gate had been fully closed before the two men in front of the intestate reached the car. The conductor testified that it was closed at that time and was pushed open by them. Witnesses for the plaintiff testified that the conductor was closing the gate as the two men approached the car, and opened it for them to enter, and then closed it as the intestate was attempting to get on.

There is also some discrepancy in the evidence as to the distance from the car platform to the water pipe at the end of the station platform, when the intestate reached the car. One of the plaintiff's witnesses, who saw the whole transaction, testified that the distance was four or five feet, and other witnesses testified that it was ten feet.

Wilson, a witness for the plaintiff, testified: "Although my glance was momentary, I saw him (deceased) constantly from the time he put his foot on the car until he struck the projection; in my best judgment that may have been five feet, but I think it was about four feet, the distance."

Haller, also a witness for the plaintiff, was asked: "The whole occurrence from the time the conductor pulled the bell to start the car until Mr. Solomon struck against the projection and fell, occupied but a very short space of time, did it not?". He answered: "A very little time; quicker than I can tell you."

In view of the undisputed fact that the car was moving when the deceased attempted to enter it, it is evident that the obstruction against which the deceased was perilously near, and that a collision was inevitable if the deceased should fail to get onto the car and should be carried along a few feet in the position in which he was when the gate was closed.

The station platform was lighted and "everything was clear." The deceased had been accustomed to take the train in the evening at this station for more than a year. His son, who usually accompanied his father, testified that "the train stops very sharp and goes off very quick." The trains ran every five minutes. There can be no doubt that the deceased was familiar with the

surroundings and was acquainted with the manner of operating the trains.

We are of opinion that the nonsuit was properly directed. It must be assumed that the deceased, when he attempted to enter the car, knew that it was in motion. We cannot know what was passing in his mind, or of what existing facts he was actually cognizant, except by inference. But what others saw and knew in respect to matters equally open to his observation, must be presumed to have been seen and known by him; especially is this presumption a reasonable one in respect to matters which common prudence required him to know and observe before he attempted to enter the car. Knowing then, as must be inferred, that the train was in motion, he took the risk of the attempt to board it. The movement of the train was itself notice to him that the time for receiving passengers had passed. He undoubtedly thought he could board the train in safety, and, except for the act of the conductor in closing the gate, the attempt would probably have been successful.

NONSUIT PROPERLY DIRECTED.

It does not appear that the deceased knew of the attempt of the conductor to close the gate before the two men who preceded him entered the car. But he was in a position to have seen it, and the act was observed by the other witnesses. We are of the opinion that the attempt of the deceased to enter the train, under the circumstances disclosed, was in law a negligent act which contributed to his death.

It is, we think, the general rule of law established by the decisions in this and other States, as claimed by the learned counsel for the respondent, that the boarding and alighting from a moving train is presumably and generally a negligent act, *per se*, and that in order to rebut this presumption and justify a recovery for an injury sustained in getting on or off a moving train, it must appear that the passenger was by the act of the defendant put to an election between alternate dangers, or that something was done or said, or that some direction was given to the passenger by those in charge of the train, or some situation created, which interfered to some extent with his free agency, and was calculated to divert his attention from the danger, and create a confidence that the attempt could be made in safety.

BOARDING MOVING TRAIN NEGLIGENCE PER SE.

McIntyre *v.* Railroad Co., 37 N. Y. 287, and Filer *v.* Railroad Co., 49 N. Y. 47, were cases of injury sustained by passengers, in the one case by going from one car to another by direction of one of the trainmen to get a seat while the train was in motion, and in the other by leaving a moving car at a station by direction of a brakeman, who directed the plaintiff, a woman, to get off, saying that the train would not stop.

In Burrows *v.* Erie R. Co., 63 N. Y. 556, the court reversed a

judgment recovered for an injury to a passenger in alighting at his station from a moving car; and in Morrison v. Erie R. Co., 56 N. Y. 302, the court reversed a verdict for the plaintiff under very similar circumstances.

It is said by Rapallo, J., in Burrows *v.* Erie R. Co., that "the cases in which a recovery has been allowed, notwithstanding that the passenger undertook to leave the car while in motion, are exceptional and depend upon peculiar circumstances." In short, as we now understand the rule established by the decisions, it is presumptively a negligent act for a passenger to attempt to alight from a moving train, and it is not sufficient to rebut the presumption that the trainmen acquiesced in the action of the passenger, or that the company violated its duty or contract in not stopping the train, or that to remain on the train would subject the passenger to trouble or inconvenience; but that to excuse such an act and free the plaintiff from the charge of contributory negligence, there must be a coercion of circumstances which did not leave the passenger in the free and untrammeled possession of his faculties and judgment.

Negligence, no doubt, is usually a question of fact of which the jury must inquire, but the inference of negligence in a given case may be so clear and convincing that the judge may direct a verdict.

The conclusion that it is *prima facie* dangerous to alight from a moving train is founded on our general knowledge and common experience, and it is akin to the conclusion, now generally accepted, that it is in law a dangerous and therefore a negligent act, unless explained and justified by special circumstances, to attempt to cross a railroad track without looking for approaching trains. In boarding a moving train there is generally less excuse than in alighting from one. The party attempting it is not often under the same stress of circumstances as frequently happens in the former case. He may be compelled to wait for another train; but this is an inconvenience merely, which does not justify exposing himself to hazard.

In Phillips *v.* Railroad Co., 49 N. Y. 177, the plaintiff was thrown against a platform in attempting to board a train while in motion, and a nonsuit was sustained in this court. In the present case the intestate was familiar with the situation. He must have known that, according to the ordinary rules, the time for receiving passengers had passed, and that the greatest celerity and promptness was required on the part of those entrusted with the management of trains.

It is said that the opening of the gate by the conductor was an invitation for him to enter, and that if the conductor had not closed the gate upon him he would have boarded the train in safety. It is true that the opening of the gate to admit the two men in front of the deceased, and their safe entrance, may have given the in-

testate confidence that he could enter also. But the act of the conductor, as the sequel shows, was not intended as an invitation to the intestate, and the conductor's misjudgment or negligence was one of the hazards which the intestate ran. It did not relieve him from the imputation of negligence because he did not foresee the obstruction which would be interposed, or that without the negligence of the conductor the accident would not have happened. One of the very dangers of the situation arose from the fact that all the contingencies upon which the success of the effort to enter the car depended could not be anticipated. If men will take such hazards, they must bear the consequences of their own rashness; and it is no just reason for visiting the consequences upon another, that his negligence co-operated in producing the result.

We think the judgment should be affirmed.

RUGER, Ch. J., EARL and FINCH, JJ., concur. MILLER and DANFORTH, JJ., dissent, RAPALLO, J., taking no part.

Injury to Passenger While Attempting to Get on Moving Train.—See note to Conner *v.* Citizens' St. R. Co., 26 Am. & Eng. R. R. Cas. 218.

DELAWARE AND HUDSON CANAL CO.

v.

WEBSTER.

(*Advance Case, Pennsylvania. October* 4, 1886.)

It is not negligence, *per se*, for a passenger to get off a car that is moving slowly, in response to an invitation by a person in charge of the train. But if the train is moving so rapidly as to render it clearly dangerous to attempt to get off, the passenger who does get off is negligent.

When there is doubt whether the speed of the train was so rapid as to render it clearly dangerous to get off, the fact is for the jury.

In a suit for damages for injuries sustained by a passenger on a gravity railroad in alighting while the train was moving no faster than a man can walk, past the point at which the conductor had promised to let him off, there was a conflict of testimony as to whether the conductor ordered him to get off or cautioned him against getting off until the train stopped. *Held*, that the fact of the passenger's negligence was for the jury.

The validity of the execution of a commission to take testimony is not affected by the fact that the commissioner signs himself throughout as a notary public merely, except across the seal of the envelope in which he returns the testimony.

ERROR to the Common Pleas of Wayne county, to review a judgment on a verdict for the plaintiff in an action of trespass on the case for negligence.

Affirmed.

This was an action by Gilbert L. Webster against the President, Managers and Company of the Delaware & Hudson Canal Co., to recover damages for injuries to the plaintiff, alleged to have resulted from the negligence of the defendant's employees.

At the trial before COLLUM, P. J., the following facts appeared:

The defendant operated a gravity railroad between Carbondale and Honesdale. The cars ran on a moderate down grade between the inclined planes, and were controlled by means of brakes; they were light and easily stopped and controlled by the brakes; and the practice was to stop at almost any point where passengers desired to get on or off.

The only intermediate point on the road where a depot was maintained was Waymart; and while at the time of the accident there were many other places that were understood by the conductors and those who frequented the road as stopping places when there were passengers to get on or off, there was nothing to indicate these stopping places, not even platforms. The plaintiff was not acquainted with the road and knew nothing about these stopping places or their location. On the 17th of December, 1879, he started to go to the house of his son-in-law, who lived on the railroad but a few rods from Keen's sawmill. He knew where his son-in-law lived, but did not know whether Keen's mill was a regular stopping place or not.

He asked the ticket agent at Waymart if he could get a ticket so he could get of at Keen's mill, and was given to understand that he could. He bought a ticket marked "Keen's." The conductor understood that he was to get off at Keen's mill and promised to let him off at that point. The cars were stopped at George Keen's house, which was not a regular stopping place, about half a mile above Keen's mill, to allow other passengers to get off. When nearing Keen's mill, the conductor applied the brakes, the plaintiff came out on the platform of the car preparatory to getting off; the conductor stood at the brakes and the speed of the train was slackened so it was moving about as fast as a man would ordinarily walk, or, according to the conductor's evidence, perhaps a little slower.

They had passed Keen's mill, and plaintiff was standing on the car step.

As to what then occurred the testimony was contradictory.

The plaintiff testified:

"Mr. Penwarden (the conductor) came out of his car, he was in the head car, and broke up the car because it was running very fast, until we got right opposite the house. Said he 'Get off.' I

didn't make him no reply. Right away said he, 'Get off.' I spoke to him and said: 'I will when you stop your shebang.' We went a short distance farther, and he said, 'I tell you get off.' I got off, and as I got off, I staggered back against the car, and that threw me down. I had a box in my hand, and it tore that pretty bad, and I fell onto my hands and knees."

The conductor testified as follows:

"When he came out on the platform I said: 'Mr. Webster, where are you going here?' Then we had got fully up to the house, even with it, and a trifle past it, and he said: 'I am going right here.' He had a square box in his hand. It was, perhaps, such a box as milliners keep feathers and such things in. It might have been two foot long and it might not. He had that right in both hands, and I saw that he was making an effort as if he wanted to get off. I saw by his motions that he intended to get off. I said: 'Wait until we stop,' but he stepped right off upon the ground. He didn't take hold of the railing of the car There is a hand rail to take hold of, to get on and off, and to protect the platform. He took hold of nothing, but stepped right down.

For the injuries there suffered this suit was brought.

The plaintiff offered the deposition of Dr. Garrison, taken in the State of Florida, on a commission issued to C. Codrington. This was objected by defendant:

"1. Because the commissioner had made and signed no return to his commission.

"2. Because the paper showed upon the face of it that the answers to the cross interrogatories were neither written by the commissioner nor at his office, the ink being entirely different from all that used by the commissioner, but that they were written by some person and brought to the commissioner's office and signed there by the witness."

The caption stated that the deposition was taken before "C. Codrington, Notary Public for the State of Florida," and all the jurats were signed in the same way. The envelope was lost, but it was proved that across the seal had been written the words "C. Codrington, Commissioner," and that the envelope was indorsed "Deposited in the post-office at De Land this 18th day of April, A. D. 1882. C. Codrington, Commissioner."

The paper book of the plaintiff in error did not contain this deposition.

The court overruled the objection to the deposition and permitted it to be read. First assignment of error.

The defendant asked the court to charge that:

"Even supposing it to be true, as alleged by plaintiff, that Penwarden, the conductor, ordered him to get off the train, no evidence being given of any threats or cause of fear, the plaintiff, in

jumping from the train while in motion, at the place and in the manner in which he did with the box in his hands, and not supporting himself by taking hold of the rail upon the step, was guilty of negligence contributing to his alleged injury, and he cannot recover in this action." Ans. "We refuse this point. The jury are to ascertain, from all the evidence, whether there was negligence on the part of the plaintiff, contributing to this injury." Third assignment of error.

And also asked the court to charge that: "The plaintiff, having admitted that he jumped off the cars while in motion, was, *per se*, guilty of negligence, and therefore cannot recover." Refused. Fourth assignment of error.

The court charged, *inter alia*, as follows:

"When a railroad company undertakes the transportation of a passenger for an agreed price, the contract implies that it is provided with a safe and sufficient railroad to the point indicated; that its cars are staunch and roadworthy; that means have been taken beforehand to guard against every apparent danger that may beset the passenger, and that the servants in charge are tried, sober and competent men. When in the performance of this contract a passenger is injured, without fault on his part, the law raises a *prima facie* presumption of negligence, and throws on the company the onus of showing that it does not exist. This rule, however, does not apply to a case where a passenger receives an injury in alighting from a car, when he has an opportunity of seeing and knowing where he is going, and controlling his movements. . . .

"The implied contract to carry a passenger safely includes the duty of giving him a reasonable opportunity to alight in safety; and it is the duty of a railroad company to cause its cars to come to a full stop for passengers to get off. But while it is the duty of a railroad to provide safe and convenient means of ingress and egress to and from the cars, it is equally the duty of passengers to use the means thus provided with reasonable circumspection and care. While the company is held to a high degree of care and skill in the transportation of passengers and is responsible for injuries to them caused by the want of it, the passengers are required to be careful and prudent, and to comform to the reasonable regulations of the company. If a passenger is injured as a result, in part, of his own want of reasonable care and discretion, he cannot recover, even though it should appear that the negligence of the company contributed to the injury. Where both parties are in fault and their mutual negligence produces the injury, neither has a right of action for it. This is called contributory or concurrent negligence. If, therefore, the negligence of a plaintiff in any degree contributed to the injury for which he sues, he cannot recover. Concurrent negligence is the absence of such a degree of care as the circumstances of the case demand. . . .

"Is the defendant responsible for the acts of the conductor in this action? We think it is. He is in command of the train and controls its movements. His negligence in letting of a passenger at a point other than a regular station affects the company. We do not mean by this to say that the plaintiff is entitled to recover in this case, or to say that there was any negligence on the part of the conductor, but to affirm that if there was negligence on his part, and if it alone, without fault of the plaintiff, produced an injury to him, the company is responsible, and must answer for it.

"Now if the conductor agreed with the plaintiff to stop the train at Keen's mill, and to allow the plaintiff to get off there, it became his duty to the plaintiff to stop the train there and to afford the plaintiff a reasonable opportunity to get off; and if the train was not stopped at that place, but its speed was slackened, and the plaintiff came out on the platform of the car and was told by the conductor to get off, and, obeying this direction, was injured without fault of his own, and by reason of an omission or refusal on the part of the conductor to stop the train and afford him a reasonable opportunity to leave the train safely, then for such injury the plaintiff may recover.

"But if, while the train was in motion, the plaintiff was told by the conductor to get off, and the circumstances were such as would necessarily or probably render such an act perilous, the plaintiff cannot recover, because to do the act would be negligence on his part, notwithstanding he was told to do so. And if it did not appear perilous and unsafe, it was his duty to exercise ordinary care and prudence in complying with the request or direction of the conductor; and if the want of such care on his part contributed to the injury, he cannot recover. When the plaintiff got off the cars he had a bundle or box in his hands. He stepped from the car to the ground while the train was moving, without taking hold of the railing of the car or platform, or taking any precautions to steady himself. Was this ordinary care, under the circumstances as developed by the evidence of the plaintiff—such care as the situation demanded? [This is for the jury, upon all the evidence in the case.]

"We have been requested to say that the evidence of the plaintiff shows contributory negligence on his part, which must defeat a recovery by him in this action. [We cannot say this. We think the jury are to inquire, in this connection, whether the plaintiff exercised ordinary care and prudence in getting off the car, having regard to the situation in which he was placed, and if he did not, whether the want of it contributed to the injury which he received.]"

Verdict and judgment were for the plaintiff, whereupon the defendant took this writ. The portions of the charge inclosed in brackets were the subject of the second assignment of error.

W. H. Dimmick and *H. Wilson* for plaintiff in error.
George S. Purdy for defendant in error.

TRUNKEY, J.—If the deposition referred to in the first assignment of error was inadmissible for the reasons stated, it is not shown by anything printed in the paper book of the defendant. From what is printed by the other party it appears there is no fatal defect. And from inspection of the return of the commissioner we find no valid objection.

CONCURRENT NEGLIGENCE OF PLAINTIFF.

The remaining question raised by the assignment is: Was it the duty of the court to instruct the jury to render a verdict for the defendant because of the plaintiff's concurrent negligence? That it was fairly submitted to the jury, if it was proper to submit at all, to find whether the plaintiff was negligent, with instruction that if his negligence contributed to the accident he cannot recover, is conceded.

Had the jury found that the whole of the conductor's testimony was true, the plaintiff had no case, and so the court charged. The statements as to what the conductor said just before the plaintiff stepped off the car are in sharp conflict. One testifies that the conductor told the plaintiff three times to get off; the conductor, that he said to the plaintiff: "Wait till we stop." It is uncontroverted that the plaintiff was to got off at Keen's Mill; that the train was not running as fast as a person would ordinarily walk; that it was under control and could have been stopped within the length of a car.

The principles applicable to the question presented are well settled. It is not negligence *per se* for a passenger to get off a car that is moving slowly, in response to invitation by the person in charge of the train. But if the train is moving so rapidly as to render it clearly dangerous to attempt to get off, the passenger who does is negligent. When there is doubt whether the speed of the train was so rapid as to render it clearly dangerous to get off, the fact is for the jury.

"Although, if a passenger, without any direction from the conductor, voluntarily incurs danger by jumping off the train while in motion, the carrier is not responsible for injury resulting therefrom, yet if the motion of the train is so slow that the danger of jumping off is not reasonably apparent, and the passenger acts under the instructions of the conductor, the defence of contributory negligence is unavailing; and it is for the jury to say whether the danger of leaving or boarding a train when in motion is so apparent as to make it the duty of the passengers to desist from the attempt." Whart. Neg. § 380.

This doctrine is sustained by numerous decisions in other States and is not in conflict with the authorities in this State.

When a person, about to jump from a car running ten miles an

hour, in midnight darkness, is warned by the conductor of the danger and told that the train shall be stopped, takes the risk, jumps and is hurt, his concurrent negligence bars recovery. In that case the court rules that an action cannot be maintained. R. Co. *v.* Aspell, 23 Pa. 147.

In McClintock *v.* R. Co. 42 Legal Int. 82, the plaintiff got off a moving train without direction or notice of any person in charge of the train; there was some conflict of testimony respecting the circumstances, and the question was submitted to the jury.

When a woman, accompanied by three children, on arriving at her place of destination proceeded to alight, two of the children had left the car, and while she was still on the car, the train started, when she sprang upon the platform and was injured. The question of concurrent negligence is to be determined by the particular circumstances, and is for the jury. Her case was not like Aspell's. The abstract truth, "that it is wrong for a party to attempt to leave the cars while they are in motion," did not apply to the circumstances in which she was placed. R. Co. *v.* Kilgore, 32 Pa. 292.

In Johnson *v.* R. Co. 70 Pa. 357, the question was whether the plaintiff, who had attempted to board a train while in motion, was guilty of contributory negligence. The court charged that if the train was distinctly running upon the track when the plaintiff attempted to enter, he was guilty of negligence and could not recover. That was held to be error; and this court ruled that it was for the jury to say, under all the circumstances in evidence, whether the danger of boarding the train when in motion was so apparent that the plaintiff was guilty of contributory negligence in making the attempt.

There was no error in submitting the question to the jury.

Judgment affirmed.

Liability for Injury to Passengers Alighting from Moving Train. — See Nance *v.* Railroad Co., 26 Am. & Eng. R. R. Cas. 223, and note; Bucher *v.* New York Cent., etc., R. Co. and note, 21 Ib., 361–364.

Baltimore and Ohio R. Co.

v.

Leapley.

(*Advance Case, Maryland. June* 22, 1886.)

Plaintiff, who was a large woman, and five months' pregnant, was with her two children, aged two and five years respectively, a passenger on defendant's road. On arriving at her destination, which was a regular stopping place, and had a platform for the use of passengers, the train only slacked, the conductor told her to "get off." She asked how; he replied "jump," and she did jump with the youngest child in her arms; *held*, that she was not guilty of contributory negligence, and was entitled to recover.

Appeal from the Circuit Court for Washington county.
W. Irvine Cross for appellant.
Frederick J. Nelson for appellee.

Stone, J.—Mrs. Leapley, the plaintiff, was a passenger on the road of the defendant from Washington city to a place in Frederick county called Tuscarora, in February, 1884. She was a large woman, weighing from one hundred and seventy-five to two hundred pounds, and in a state of pregnancy for about five months. She had with her two children, aged respectively two and five years, and several bundles. She had duly paid her fare to Tuscarora, which was a regular stopping place for the train of defendant, and where there was the ordinary platform for the entrance and exit of passengers on the defendant's road. Facts.

The plaintiff gave evidence tending to show that the train on which she was a passenger did not stop at the platform at Tuscarora, but only slacked, and did stop about three hundred feet from the platform. That the conductor used profane language, but not to her, and got off the car and told the plaintiff in a rough manner to "get off;" and, upon her asking him how, replied "jump;" and that thereupon she did jump with the youngest child in her arms. That the car step from which she jumped was about three feet from the top of the rail, and that the ground was fifteen inches below the rail, so that, according to her evidence, the distance she jumped was about four feet three inches. She also gave evidence tending to show the injuries she received from the jump.

The defendant gave evidence tending to show that the train did stop at Tuscarora, but not long enough for plaintiff to get off; but that the engineer, mistaking a salutation made by the conductor to a friend for a signal to start, started off before plaintiff could get off the train. That the train was stopped as soon as it could be at

the distance of about ninety feet from the platform. That Mrs. Leapley appeared upon the platform of the car with her children, and seemed very anxious to get off, and that she was assisted and lifted down with all possible care and gentleness, and that no profane language was used, or anything said to wrong her. That the distance from the lowest step of the car to the ground was not more than about two and one-half feet, and that plaintiff made no objection to getting off where she did; this is the defendant's evidence.

CARE REQUIRED OF PASSENGER CARRIERS.

That the carriers of passengers are required to observe the utmost care is a question now so well settled that it is not necessary to quote authorities. If the carrier is a corporation their agents are required to use the same care. They, the agents, are presumed and required to have the ordinary senses, especially in so responsible a position as the conductor of a railroad train. They certainly are presumed and required to have the ordinary eyesight, so that they can distinguish between a man in the vigor of his life and a woman in a state of pregnancy and accompanied by young children. They are expected to have and must have, in order to discharge their duty properly, judgment enough to know that what would be safe for the one would not be safe for the other. Whether this care which the law requires was observed, is the question in this case.

There is really no very important conflict of testimony. The woman bought a ticket from Washington to Tuscarora, a known station with the ordinary platform for the passengers to get on and off the cars by. This ticket gave her the right to be put off on that platform; whether the cars slowed up but did not actually stop, or whether they did stop, but not long enough for the plaintiff to get off, is immaterial; the result is precisely the same. By the act of the defendant, she could not get off at the place that her ticket contracted that she could get off. This failure of the railroad to put the plaintiff off at the usual platform provided for that purpose, and when no good reason existed why they did not do so, we think was an act of negligence on the part of the road, and if the plaintiff was injured thereby, and without fault on her part, she is entitled to recover.

PLAINTIFF NOT GUILTY OF CONTRIBUTORY NEGLIGENCE.

But, notwithstanding the improper conduct of the defendant, if the plaintiff, by her own negligence and want of care, contributed to the accident, she would not have been entitled to recover, and the defendant's third prayer should have been granted, had there been any evidence legally sufficient to support it. But we perceive none in the record. According to the defendant's evidence, the conductor took from her arms the young child, and the brakeman, a strong man, lifted the plaintiff down. There is certainly nothing in this defendant's proof showing the slightest want of care on the part of the plain-

tiff. If we take her evidence, we find that she was told by the conductor to "jump off," and that she did so. In so doing she was only obeying the explicit orders of the person in charge of the train, and to whom the safety of the passengers was committed. It would come with a very ill grace from the road to say to the passengers "you have been careless and negligent because you obeyed the order of my agent." Whether we take the evidence of plaintiff or defendant, we find no element of contributory negligence, and the third prayer was properly refused for that reason.

The defendant's second prayer is based upon the hypothesis that in obeying the order of the conductor she committed an act of negligence, and what we have already said disposes of that prayer.

The fourth prayer of defendant is based upon another erroneous hypothesis. That prayer asks the court to say substantially, that although the defendant did wrong in not stopping at the platform, that if the conductor and brakeman helped her down as carefully as they could, then she cannot recover, although she was injured in so getting down. In other words, that if after the defendant had been guilty of an inexcusable act of carelessness and negligence it was guilty of no more negligence, that it should be excused. The statement of the proposition carries its refutation with it. The plaintiff offered two prayers which were granted. The first prayer is a full and correct statement of the law of the case and was properly granted.

We have heretofore said that the defendant was guilty of negligence in carrying the plaintiff beyond the platform; still if the plaintiff, by her own negligence in getting off, contributed to the injury, she could not recover. It was to meet that view of the case that the second prayer of plaintiff was offered, and we think properly granted by the court. If, without any direction from the conductor, the plaintiff had jumped from the car as detailed by her, it might well have been said that she had not used that due care which she was bound to use. But if she was excited and alarmed by the language used by the conductor, although it was not addressed to her, and in that condition she was told by the conductor to jump, and she did so, we have already said that such an act did not constitute contributory negligence, and it was, therefore, proper for the court so to instruct the jury.

Seeing no error in the ruling, the judgment must be affirmed.

Judgment affirmed.

Alighting from Moving Train by Direction of Company's Employees.—See Lindsay *v.* Chicago, etc., R. Co., 18 Am. & Eng. R. R. Cas. 179; St. Louis, etc., R. Co. *v.* Cantrell, 8 Ib. 198.

STRAUS

v.

KANSAS CITY, ST. JOSEPH AND COUNCIL BLUFFS R. CO.

(86 *Missouri*, 421.)

In an action against a railroad company by a passenger for injuries received in alighting from a train at the company's station, if the train did not stop a sufficient length of time to enable the plaintiff, by the use of reasonable expedition, to get off before it was again started, and it was so started while plaintiff was in the act of alighting, whereby he was thrown down and injured, the company is liable for the injury.

If the train was stopped a sufficient length of time for plaintiff to conveniently alight, and, without any fault of defendant's servants, he failed to do so, and the conductor, not knowing and not having reason to suspect that the plaintiff was in the act of alighting, caused the train to start while he was so alighting, the defendant would not be liable.

If a conductor has reason to believe that any passenger who has reached his destination, though dilatory, may be in the act of alighting, and he starts his train without examination or inquiry, and such passenger is in the act of alighting when the train is started, and is thereby injured, the company will be liable.

It is for the trial court to determine whether counsel in the conduct of a case, and in argument to the jury, transcend the limits of professional duty and propriety.

Where counsel cannot agree as to the evidence in a cause, or misstate the evidence, in argument to the jury, it is the peculiar province of the jury, and not of the court, to determine what the evidence was.

It is not reversible error for a non-expert witness, who testifies to the facts in a case, to give an opinion based upon such facts.

APPEAL from Buchanan Circuit Court, Hon. Jos. P. Grubb, Judge. Affirmed.

Strong & Mosman for appellant.

Woodson, Green & Burnes for respondent.

NORTON, J.—This cause is before us for the second time on defendant's appeal from a judgment of the Circuit Court of Buchanan county. Plaintiff, who was a passenger on defendant's train, destined for Pickering, a station of its road, sued to recover damages for injuries sustained by him, by reason of the alleged negligent failure of defendant to stop its train a sufficient length of time at said station to enable him to get off at said station, and in prematurely starting the train while he was in the act of alighting, whereby he was thrown between the cars and platform of the depot and injured.

FACTS.

The opinion delivered in this case when it was first before the court is reported in 75 Mo. 185. The evidence bearing on the

point there raised by counsel, and, also, now raised, that there was no evidence on which to submit the question to the jury, that the conductor either knew, or had good reason to believe, that plaintiff was in the act of alighting from the train, when he ordered it to start, is thus stated in the opinion: "The plaintiff himself testified as follows: 'On the twenty-sixth day of November, 1877, I was a passenger on the defendant's train, going to Pickering. Just as the train whistled for Pickering, I got up from my seat and went to the door of the car. When it stopped, I opened the door and started out, and the car started, just as I was in the act of getting off, with a sudden jerk, and I was thrown down between the car and the platform, and rolled around till I got to the end of the platform.' . . . Several witnesses testified that the plaintiff told them a short time after the accident, that he had been travelling on trains so much that he had become careless; that he did not notice that the train was moving, and that he got off backwards, and that nobody was to blame for his getting hurt but himself. . . . The plaintiff, on his cross-examination, admitted that he stated to several persons that the conductor was not to blame, but said he so stated because he did not wish to get the conductor into trouble. But he denied that he ever stated to any one that no one was to blame but himself. The conductor testified as follows: 'The train stopped still. The stop was at least for one half minute. We stopped the usual length of time for stops at stations at which no business is to be transacted. After the train stopped I walked out on the depot platform, walked across to the corner of the depot, and leaned up against the building a few seconds. . . . As I went across the platform to the depot, I looked to the left over my shoulder, to the rear of the train, and saw the plaintiff coming down the steps of the car. I leaned against the depot a few seconds, and then gave the signal to the engineer to go ahead, and walked across the platform to the door of the baggage car and went in. I went into the same door I came out of; went back into the same car. The car had not started when I went into it.' The station agent at Pickering testified, in substance, that after the train stopped, he walked from his office across the platform to the train, got his mail from the train, and returned to the office door before the train started. He saw the plaintiff standing on the car platform looking through the door into the car, and saw him after the train started step off the car on the wrong foot, which whirled him around and off his feet."

On this state of facts the judgment was reversed, not because there was no evidence on which to submit to the jury the question whether the conductor knew, or had good reason to believe, that plaintiff was in the act of alighting from the train when he started it, but the judgment was reversed and the cause remanded for another trial on the distinct ground that an instruction which did

submit that very question was erroneous only in that it ignored the question as to whether the train in fact was stopped a reasonable length of time to enable the plaintiff to get off, and the further ground that there was a conflict between an instruction given for plaintiff and one for defendant. The point then made that there was no evidence upon which to submit the case to the jury was not sustained, but, on the contrary, in speaking of the facts in evidence, the court proceeded to lay down the law applicable, and for the guidance of the trial court on a re-trial, as follows: "If the servants of the defendant did not halt the train at Pickering station a sufficient length of time to enable the plaintiff, by the use of reasonable expedition, to get off before it was again started, and it was so started while plaintiff was in the act of alighting, whereby he was thrown down and injured, the defendant is undoubtedly liable."

"If the train was stopped a sufficient length of time for plaintiff to conveniently alight, and, without any fault of defendant's servants, he failed to do so, and the conductor, not knowing and having no reason to suspect that plaintiff was in the act of alighting, caused the train to start while he was so alighting, the defendant would not be liable."

An examination of the record now before us shows that the evidence, as to what took place with reference to stopping and starting the train when the accident occurred, is substantially the same as reported in 75 Mo. *supra*, and it also shows that on the re-trial of the cause, the trial court gave an instruction strictly in harmony with the theory indicated in the opinion of the court. For that reason, and believing the questions therein settled and the principles therein announced to have been correctly settled, and fully supported by the authorities cited in the opinion, we decline to rediscuss or re-investigate them, further than to say that we are not disposed to relax any of the rules of law which impose on a common carrier the strictest observance of the contractual obligations it assumes to a person whom it has received as a passenger, not only in using the utmost care and caution in carrying him, but also the same care and caution in stopping and starting its trains at the station to which it has agreed to carry him.

The conductor, in his evidence, stated that the train stopped thirty seconds, or less; "that he stepped onto the platform at the depot and looked back southward to the passenger coach, and saw Straus on the steps of the passenger coach, as though coming down the steps to the depot platform; the train stopped a half minute, or less;" that he walked on four or five steps to the corner of the depot, turned round facing the train, and looked northward towards the engine, and gave the signal to start. To hold, under these facts, that the failure of the conductor to ascertain that plaintiff had alighted from the train before he gave the signal to start it,

which fact he could have ascertained (and which, under the circumstances, it was his duty to ascertain), had he looked south where he first saw plaintiff on the steps, is no evidence of negligence, would be to hold that a conductor might shut his eyes, under circumstances which made it his duty to look. In the opinion in this case, in 75 Mo., *supra*, it is said that if a conductor "has reason to believe that any passenger, who has reached his destination, has not alighted, and, though dilatory, may be in the act of alighting, and he starts his train without examination or inquiry, and such passenger is in the act of alighting when the train is started, and is thereby injured, the company will be liable." Although the conductor stated that the train stopped thirty seconds or less, although he saw plaintiff on the steps, as though coming down the steps, a few seconds before he gave the signal and started the train, he made neither examination nor inquiry, but instead of simply casting his eye, the work of a moment, south towards the place where he had seen plaintiff a moment before, to ascertain whether he had reached the platform, he looked away from him, to the north, and gave the engineer the order to go, which resulted, according to the evidence of plaintiff, in putting his life in great peril by being rolled between the train and depot platform, and dumped to one side when the end of the platform was reached.

Another ground of objection is that defendant applied for a continuance on account of the absence of one Wallbridge, a material witness, setting out in the application what it expected to prove by him, and thereupon plaintiff admitted that said Wallbridge, if present, would testify as stated in the application; whereupon the court overruled the application, and the trial proceeded, during which the evidence of said Wallbridge, as set out, was read to the jury. After all the evidence was put in and instructions given, Mr. Green, one of plaintiff's counsel, in his opening speech to the jury, said: "Why is not witness Wallbridge here to testify and let us cross-examine him? He lives here in this city; he has left defendant's employ. They (meaning defendant's counsel) tell us he has been sent for and won't come. Why won't he come? While he was in their service he swore to suit them. He will not come now and swear to the truth for fear of being prosecuted for perjury by this soulless railroad corporation," or language to that effect. When defendant's counsel objected to this line of argument, and asked the court to interfere and rebuke counsel for discussing facts not in evidence, the court interfered no further than to tell the jury, in substance, that they were only to consider such matters as were shown by the evidence. The circuit judge who heard these remarks, and was cognizant of the circumstances under which they were made, and who was presumably acquainted with the intelligence of the jury to whom they were made, and with the ability of counsel for defendant, who were

REMARKS OF COUNSEL.

to follow Mr. Green, to explain to the jury that defendant had asked the court to continue the cause on account of the absence of Wallbridge, and in order that it might have him in attendance, and that the continuance was prevented by the admission of Mr. Green himself that the witness, if present, would testify to the facts as set out in the application, was in a better position than we are to determine how far he should interfere and rebuke counsel, and whether what was said would or not be likely to prejudice the jury against the defendant. State *v.* Hamilton, 55 Mo. 520.

The court did interfere, and what was said by the judge to the jury was equivalent to telling them to disregard the remarks made by Green. Can we say that the trial judge exercised his discretion improperly in not going further than this? If so, what rule shall be laid down for the government and guidance of *nisi prius* judges in such cases? Looking at it from my standpoint, and presuming, as I may (what the Circuit Court, perhaps, knew), that those who composed the jury were men of ordinary intelligence, and understood the obligations of the oath they had taken, such remarks, if calculated to prejudice them at all, would be more likely to prejudice them against the plaintiff than defendant, because of his counsel having resorted to a line of argument so easily exposed and turned against him. This court has in several instances reversed judgments where counsel, in the closing argument, where there was no opportunity for reply, were permitted to misstate the law without rebuke; but in no case, that I am aware of, has this been done when improper remarks were made as to the evidence, by counsel in an opening argument, where such statements could be corrected by counsel in reply. It is the common experience of all judges that in most trials had before them, where there is evidence on both sides, that opposing counsel differ in their understanding as to what the evidence was in the case, and in such cases it is the peculiar province of the jury, and not of the court, to determine between them.

During the trial plaintiff read the deposition of Andrew Hose, who testified that "he was on the train when plaintiff was injured, and that the train came to a dead stop and started immediately; that he (Straus) as soon as the train stopped, walked out of the car to get off, and just as he was stepping off, the train started with a jerk, and he fell; Straus was standing right in the car door, and as soon as it halted he walked out to get off [the stop of the train was not long enough for him to step from the car door to the platform, in my opinion."] The above statement, included in brackets, was objected to on the ground that it was the expression of the opinion of the witness; the objection was overruled, and the evidence received. The deposition of Amanda Jackson was also read, who testified as follows: "I was on the train at the time a young man

DEPOSITIONS—OPINION EVIDENCE.

by the name of Straus was injured; he was sitting in front of me; at the time the train came to Pickering I was about the centre of the train, and he was in front of me. As the train approached the depot at Pickering, he started to get off; the train did not come to a standstill at all, to the best of my knowledge. [I don't think it stopped long enough for any one to get off with safety.] I don't think it stopped at all." The same objection was made to such of the above as is included in brackets, which was also overruled. This action of the court is also assigned for error.

If these witnesses had been allowed simply to give their opinion, without more, that the train did not stop long enough for plaintiff to get off, the rule invoked by defendant that a witness should not be permitted to give his opinion, but should state facts, would apply, and might justify an interference with the judgment. But in this case, Mrs. Jackson expressed the opinion that the train did not stop long enough for plaintiff to alight, and swore as a fact that the train did not stop at all, and emphasizes this fact by repeating it. Witness Hose expressed the same opinion, and in the same connection swears positively to facts conclusively showing that the train did not stop long enough for plaintiff to alight; he testified that as soon as the train stopped he saw the plaintiff walk out of the car door to get off, and, just as he was stepping off, the car started with a jerk, and he fell. In face of the facts thus sworn to by these witnesses, and the statutory prohibition (section 3775) that no judgment shall be reversed unless error has been committed materially affecting the merits of the action, to reverse this judgment for the last error assigned would be wholly unwarranted. Besides this, the rule that the opinion of a non-expert witness is not to be received in evidence has its exceptions. Where the value of property is in question, a witness, who states that he is acquainted with the value of that kind of property, may give his opinion of the value of the property in dispute. So, where the question of the sanity of a person is involved, a witness may give his opinion, provided he states the facts upon which it is founded. The length of time that the train stopped, to some extent, involved an expression of opinion. When the conductor testified that the train stopped "half a minute or less," it was nothing more than the expression of his opinion.

The instructions given in the case, being in strict harmony with the law as laid down in 75 Mo., *supra*, and finding nothing in the record justifying an interference with the judgment, it is hereby affirmed. Ray and Black, JJ., concur.

SHERWOOD, J. (dissenting).—Called upon as one of the judges of this court to say whether I concur in the foregoing opinion, I say I dissent, and I say so for these reasons:

I. There is not a scintilla of testimony that the conductor knew

that plaintiff was in the act of alighting when he gave the signal for the train to start.

NO KNOWLEDGE BY CONDUCTOR THAT PLAINTIFF WAS IN ACT OF ALIGHTING.

The tendency of the testimony, and its only tendency, is to show that the conductor had every reason to believe that the plaintiff, seen by him on the steps of the rear passenger car, and in the apparent act of alighting on the platform, had stepped down from the car before he gave the starting signal. The conductor was in the baggage car when the train stopped; he stepped out of the side door of the baggage car, and as he did so, looking southwardly, he saw plaintiff on the steps, etc., and then the conductor, being on the depot platform, walked four or five steps or more across that platform to the corner of the depot building, then turned around, facing the train and, looking northward towards the engine, called out, "all aboard," and raised his hand, gave the signal to the fireman for starting, then walked back across the depot platform to the baggage car from which he had come, mounted into it, and after he did so, the train, which had stopped its usual length of time, started; and after the train had moved some sixty feet it was stopped by the ringing of the bell.

The testimony of the conductor is supported by that of the station agent, Harmon, who testified that the train stopped the usual time; who, hearing the train approaching, took the United States mail sack in one hand, and some company mail in the other, and when the train stopped, came out of the depot door just as it did so, saw plaintiff on car platform in front of him; walked diagonally across station platform in a northeast direction, twenty-five or thirty feet, to the door of the baggage and mail car, exchanged mail with the United States mail agent and baggage man, turned and walked back to door of depot; turned around before going in, saw plaintiff coming down the car steps, the car standing still, with his attention divided between what he was doing and the car window; and when the car commenced to move, noticing plaintiff was inattentive and was about alighting on his right foot, and, knowing this would be dangerous, called out to him, "Look out, or you will fall," when plaintiff, who was facing westward, the car moving northward, touched, or appeared to touch, the platform with his right foot and fell forward with the train, and that if he had been paying attention to what he was doing he need not have fallen at all. Harmon also corroborates the testimony of Heaton, the conductor, as to the latter getting off the train after it stopped, walking across the depot platform to the corner of depot, turning, calling "all aboard," and giving the signal for starting the train. The testimony of Harmon is supported by that of plaintiff himself, who says that, as he was coming down the steps of the car, he saw Harmon, the station agent, standing near the door of the waiting room facing him; that Harmon called out, as he was

on the bottom step in the act of stepping off, "Look out, or you will fall;" that he does not know on which foot he tried to alight. Bryant, also, fully corroborates the conductor's testimony. And the plaintiff, when on the stand, testified that he did not blame the conductor for being hurt; that he had testified on a former trial that he told Clutter and Southerland the same thing. Several witnesses testified that plaintiff had made similar statements to them.

The foregoing is substantially a correct *resumé* of the evidence on the point of the conductor's knowledge of the plaintiff's *status* at the time he signalled the train to start. If there is in the record before me the slightest trace or indication of such knowledge, a patient reading of the evidence has failed to disclose it. If this be true, then it must follow that the second instruction given on behalf of plaintiff was fatally erroneous, and that there was no evidence on which plaintiff could base a recovery. In my opinion, the plaintiff's sworn admission that the conductor was not to blame is intrinsically sufficient to send the cause out of court, as much so as if the plaintiff had in terms admitted that the defendant company was not in fault. If the conductor was not to blame, who was, pray? This is sufficient to dispose of this cause without more. When it was here before, the evidence was not discussed, so far as we can judge by the report in 75 Mo. 185. But it was then and there declared "as the settled law of this State that when the concurring negligence of a plaintiff proximately contributes to produce the injury complained of, there can be no recovery, unless such injury is also the direct result of the omission of the defendant, after becoming aware of the danger to which the plaintiff was exposed, to use a proper degree of care to avoid injuring him." Applying that principle now, and bearing in mind the evidence, what becomes of plaintiff's case?

II. I have not the time to discuss the instructions in detail. Of those for the plaintiff, the first one will be found, on examination, to violate the rule so frequently and so recently announced by this court, that hypothetical instructions, which authorize a recovery, must set forth all the facts authorizing such recovery. Sullivan *v.* Ry., Oct. Term, 1885, and cases cited.

III. If it be said of the evidence in this cause that it is the same, substantially, as before, and that this court, by failing to discuss it, has tacitly sanctioned its sufficiency, I have this to say, that this court, when this cause was here before, seems to have contented itself with pointing out several errors in the instructions, and then, after announcing the controlling principle of law in the case, to have sent it back, possibly for retrial. Sometimes cases are treated too gingerly, sent back to plague the trial courts, and then to return to us, when, if the evidence were carefully examined, it would have been found that

FORMER APPEAL —SUFFICIENCY OF EVIDENCE.

plaintiff's own evidence gave him no standing in court. But, granting that this court committed error in failing to discuss the evidence when the cause was here before, this should not preclude us from doing so now. Error is not sacred; it has no vested right to existence; and it becomes us as men, certainly as judges, whenever error is discovered for the first time, to confess and to forsake it at the earliest opportunity. Prov. xxviii., 13.

A noted example of this kind, in this court, is found in the case of Hamilton *v.* Marks, 63 Mo. 167, where the trial court having tried the cause on a correct view of the law, this court, in 52 Mo. 78, reversed the judgment and sent it back for re-trial on an incorrect doctrine, and it was thus re-tried, but on coming back here, the law was correctly declared, just as the Circuit Court first held, and the judgment was again reversed. And that case by no means stands alone in the judicial annals of this court. And, in my opinion, it makes no matter that the error was one *in pais*, instead of one in law. If gross and palpable injustice has been done, such as I think has occurred in this case, it should be corrected, and it will be a reproach on the administration of justice if it be not done.

Let me mention another case where this court, being apprised thereof, has confessed and forsaken its error; error committed and error forsaken in the same cause. Take the case of Bell *v.* Railway Co., 72 Mo. 50. A boy was standing on the railroad track in broad daylight, and while standing there was run over and killed by a passing train of cars; the evidence was discussed and so were the instructions, but the evidence was not declared insufficient; several of the instructions were declared improper, and the judgment was reversed and the cause remanded, presumably for a new trial, as no hint or intimation was given contrawise. Well, the cause was re-tried on the theory of the law, as laid down by this court, and the plaintiff again recovered, and the defendant came here again on appeal; the evidence all one as before; the cause was re-argued. Ray, J., wrote the opinion of the court, affirming the judgment; a motion for re-hearing was filed on the ground that there was no evidence to support the verdict. What did this court do? Did it continue to wallow in the slough of flagrant misapprehension into which it had fallen? Nay, verily. It granted the motion; it reheard the cause; it reversed the judgment, on the sole ground that there was no evidence whereon to build the verdict. Norton, J., concurring, *post*, p. — . Why not take the same course now?

But in this case it is said that "the point then made that there was no evidence upon which to submit the case to the jury was not sustained," etc. In Bell's case such a point was not taken until the cause was argued here the second time. Is it right to punish the vigilant and reward the negligent? Queer law and justice, that.

IV. The judgment should be reversed because of the admission of testimony of witnesses, non-expert, that the train did not stop long enough for any one to get off with safety. This was incontestably erroneous; a mere guess at best, and usurped the province of the triers of the facts. This point was not passed upon when the cause was here before, and the same observation applies to some other points I have touched upon. OPINION EVIDENCE.

V. The judgment should be reversed because of the remarks made by counsel in reference to the absent witness, Wallbridge. The application for a continuance was in full and regular form, and authorized a continuance, which would have been granted had not the counsel for plaintiff, under the provisions of section 3596, Revised Statutes, admitted that the witness, if present, would swear as in the affidavit set forth. This admission was made, and that portion of the affidavit which related to Wallbridge's evidence was read on the trial, which was all of the affidavit that could be read; but plaintiff's counsel, against the earnest protest of counsel for defendant, was permitted to make the remarks already set forth in the opinion of the court. For similar remarks the judgment in a criminal cause was recently reversed in this court. State *v.* Barham, 82 Mo. 67, Norton, J., delivering the opinion. I can discover no reason why the same principle does not apply in a civil cause in similar circumstances. The statutory provisions referred to are at best but a beggarly substitute for oral testimony, granting that the statute is constitutional. But certainly the diminished and feeble force of such statutory evidence should not be allowed to be still further weakened by remarks of counsel, who have solemnly agreed that the facts so stated shall be read in evidence, and who then is allowed, without rebuke, to attack the very paper but for the admission of whose recitals the cause would have been continued. I will not sanction by my concurrence such a travesty of judicial proceedings. REMARKS OF COUNSEL.

VI. The judgment should be reversed because counsel were permitted to palpably and grossly misstate the facts in evidence. The views of this court in the State *v.* Emory, 79 Mo. 461, as to all proper invective that can be indulged in by counsel in the course of argument, I regard entirely correct, but counsel must not go further than this; must not travel entirely out of the record, and appeal to the prejudices and passions of the jury by invective, based upon simulated facts, and do this, too, without even the semblance of the mildest form of rebuke from the trial court. Counsel for defendant cites authorities for this position, but the principle is too plain to require a precedent.

For these reasons I am for reversing the judgment.

Starting Train While Passenger is in Act of Alighting.—See Straus *v.* Kansas City R. Co., 6 Am. & Eng. R. R. Cas. 384; Mitchell *v.* Chicago, etc., R. Co., 12 Ib. 163; Mitchell *v.* Chicago, etc., R. Co., 18 Ib. 176.

NESLIE *et ux.*

v.

SECOND AND THIRD STREETS PASSENGER R. CO.

(*Advance Case, Pennsylvania. October* 4, 1886.)

The plaintiff while alighting from one of the defendant's cars, and carrying a child on her left arm, tried to reach with her right hand the handle of the rear dasher. But as another passenger, though there were empty seats in the car, was standing in the way, she missed the handle and, slipping on ice which remained on the step from the previous day, fell and received severe injuries.

Held, that the evidence made out a case for a jury; and a nonsuit was error, although it appeared that the plaintiff knew there was ice on the step and might, by changing the child to the other arm, have grasped with her left hand the handle on the end of the car.

ERROR to Common Pleas No. 4 of Philadelphia county, to review a judgment of nonsuit in an action of trespass on the case. Reversed.

This action was brought by William Neslie and Margaret, his wife, in the right of the wife, against the Second and Third Streets Passenger R. Co. to recover damages for injuries alleged to have been received by the wife through the defendant's negligence.

At the trial the testimony in behalf of the plaintiff was substantially as follows: The plaintiff, Margaret Neslie, with her child about two years old, and accompanied by her mother, was a passenger on one of the cars of the Second and Third Streets Passenger R. Co., in the city of Philadelphia, on the evening of February 3, 1885. When the car reached Second and Market streets, she started to leave it, carrying her sleeping child on her left arm.

The car was heading down Second street, being towards the south, and she attempted to get off on the west side, as she wished to go up Market street. Her right arm being the free one was, therefore, next the car dasher, and she reached it out for the purpose of grasping the handle on the end of the dasher to assist her in alighting. She was unable to reach the handle, owing to the presence of a passenger on the platform, who stood against the dasher and barred her from it. She then stepped down, not having hold of either the handle on the dasher or the handle on the rear end of the car, slipped on some ice on the car step and fell.

The presence of the ice was proved as being "more than would be caused by persons getting in and out;" and it was also proved that on the day of the accident it had not stormed, while on the day previous it had.

Plaintiff testified that when she first stepped on the car her foot slipped on the ice. She also testified that at the time of the accident there were but four or five persons inside the car.

The extent of the plaintiff's injuries was testified to by several witnesses, including the physicians who attended her.

The trial judge, on motion of the counsel for the defendant, entered a nonsuit, which the court in banc subsequently refused to take off; whereupon, the plaintiffs took this writ, assigning as error the action of the court in entering the nonsuit, and in refusing to take it off.

James P. Dolman and *John Dolman* for plaintiffs in error.

George W. Thorn for defendant in error.

MERCUR, C. J.—This was an action on the case to recover damages for an injury to the person of the plaintiff. When her evidence was closed, the learned judge ordered a nonsuit, which the court refused to take off. The question therefore now is, Should the case have been submitted to the jury? SUBMISSION OF CASE TO JURY.

The plaintiff was a passenger in a car of the defendant. In alighting therefrom she fell and received an injury. Her complaint is that the defendant did not furnish her safe and convenient means of exit as it was bound to provide. If there was no doubt of the existence of the facts complained of, yet if there be substantial doubts as to the reasonable and natural inferences to be drawn from those facts, they should be submitted to the jury. McKee *v.* Bidwell, 74 Pa. 218; Crissy *v.* Pass. R. Co. 75 Pa. 83.

What is or is not negligence in a particular case is generally a question for the jury. Fritsch *v.* Allegheny, 91 Pa. 226.

The defendant is a carrier of passengers for hire. As such it was its duty not only to transport them safely, but also to provide reasonably safe means for their getting on and off the car. Did it do so in this case? Under all the evidence was that a question of fact for the jury to find, or was it to be determined by the court as matter of law?

This accident occurred on an evening in the month of February. The plaintiff testified substantially that when she got out of the car she was carrying her child on her left arm; she tried to get hold of the dasher with the other hand; she could not do so, as a passenger standing on the platform was leaning against it. There were two passengers on the platform, one on each side of the conductor, and some four or five passengers in the inside of the car. In getting down, her foot slipped on the step by reason of ice thereon, and she fell and was injured. FACTS.

It appears that there had been a storm on the previous day, but none on this day. It is alleged that this ice had been suffered to remain on the step from the previous day. It was there when she got on the car and she slipped in getting in.

Thus there are two specific causes of complaint. The first is that when there was ample room for all the passengers to ride in the car, the defendant permitted one to stand on the platform in such a position that plaintiff could not avail herself of the security and protection which she otherwise would have enjoyed; the other, the omission to remove from the step the ice formed during the storm of the previous day.

NEGLIGENCE IN GETTING ON CAR.

Under the evidence we do not think the plaintiff was so clearly guilty of contributory negligence, in the manner in which she got down from the platform, as to authorize the court to declare it to be such as matter of law. Her previous knowledge of the condition of the step, and whether it was reasonably prudent for her to attempt to alight in the way and manner she did, are questions of fact for the jury.

The other contention relates to the alleged negligence of the defendant.

NEGLIGENCE IN PERMITTING PASSENGER TO STAND ON PLATFORM.

It may not be negligence, *per se*, to permit passengers to stand on the platform; yet it is frequently very annoying to all persons in getting in and out of the cars, and to ladies especially offensive. If, in this case, the defendant permitted a passenger to remain standing on the platform in such a position as to deprive the plaintiff of that reasonable support which would have protected her from injury, and did not furnish other suitable protection, we think the jury is the proper tribunal to find whether the defendant was thereby guilty of negligence.

If the ice on the step caused the plaintiff to fall, or contributed thereto, it is proper for the jury to consider whether, under all the circumstances proved, it was suffered to remain thereon for an unreasonable length of time. It may be impossible in the winter to prevent deposits on the step by falling snow, or from the feet of persons entering the car, and which in either case may result in the formation of ice. The main question in regard to this is whether it remained there for such time and in such form as to establish the negligence of the defendant, and whether this negligence contributed to the injury of the plaintiff.

The evidence is sufficient to send the case to a jury with proper instructions, and the court erred in not taking off the nonsuit.

Judgment reversed and a *procedendo* awarded.

NICHOLS

v.

DUBUQUE AND DAKOTA R. Co.

(*Advance Case, Iowa. April* 23, 1886.)

The plaintiff, while in the act of alighting from defendant's train, fell, and received injury. The evidence showed that she had numerous bundles with her, and that she was delayed a little by them in alighting, and returned once into the car after she had delivered a part of her bundles to her husband, who met her upon the platform of the car. The platform was higher than those at other stations. The train stopped its usual length of time at the station. She descended one step from the platform, and attempting to get off as the train started, fell, and was injured. There was no evidence of any expenses incurred in nursing, but there was a loss of time occasioned by the injury. In an action to recover damages, *held*,

1. That the fact that the platform was higher than those at other stations was immaterial.

2. That the customary time of stopping was inadmissible as evidence.

3. That it was not negligence when she had descended a step from the platform to step off as the train started.

4. That the plaintiff could not recover for expenses of nursing when there was no evidence of any such expense.

5. That the husband and wife must join in an action for loss of time resulting from an injury to the wife.

APPEAL from Butler District Court.

Action for a personal injury. There was a trial to a jury, and verdict and judgment were rendered for the plaintiff. The defendant appeals.

J. M. Heminway and *Gibson & Dawson* for appellant, Dubuque & D. R. Co.

No appearance for appellee, Lucinda Nichols.

ADAMS, C. J.—The plaintiff, Lucinda Nichols, took passage on the defendant's road at Waverly, and under a ticket which entitled her to be carried to Dumont, her point of destination. FACTS. On arrival at that point the cars stopped, and the plaintiff proceeded to alight. While in the act of alighting, according to her testimony, the cars started, and she fell and received the injury of which she complains. The evidence showed that she had numerous bundles with her, and that she was delayed a little by them in alighting, and returned once into the car after she had delivered a part of her bundles to her husband, who met her upon the platform of the car.

1. Upon the trial the plaintiff's husband was examined as

a witness, and was asked how the platform at Dumont compared in height with the platform at Allison, another station on the road, and was allowed to answer, against the objection of the defendant, that it was considerably higher. The admission of this evidence is assigned as error. If the platform was higher than it should have been, and the height contributed to the difficulty of alighting safely, under the circumstances shown, it may be that the plaintiff would have been entitled to show such fact, as bearing upon the question of her freedom from contributory negligence; but we are not able to see how the mere fact that the platform was higher than the one at Allison was material. In our opinion, the evidence should not have been admitted.

EVIDENCE—HEIGHT OF PLATFORM.

2. One Helgerson was introduced as a witness by the defendant, and, after testifying that he was a railroad agent, and was on the same train with the plaintiff, engaged in paying off the employees of the company, he was asked to state if he knew from observation, experience and information derived from other sources the usual length of time which a passenger train stops at a station the size of Dumont. This question was disallowed, and the defendant assigns the ruling as error. The defendant contended that the train stopped the usual time, and that the conductor gave the signal to start when the plaintiff was not in sight, and when he had no reason to suppose that she had yet to alight. If there was a customary time during which trains in general, including the one in question, stop at such a station, we think it was competent for the defendant to show it as the foundation for showing that the stoppage of this train previous to the accident was of the customary duration; but the question asked does not appear to us to be quite broad enough, and we think it was properly disallowed.

EVIDENCE—TIME OF STOPPING TRAIN.

3. The defendant asked an instruction in these words: "If you find the train had started before the plaintiff alighted, and she, attempting to get off after the train had started, was injured, then you will find for the defendant." The court refused the instruction, and the defendant assigns the refusal as error. The evidence tends strongly to show that the plaintiff had descended one step from the platform of the car, and was about to descend another step when the train started. If such was the fact, we cannot say, as a matter of law, that the plaintiff was guilty of negligence if she did not arrest her progress instantaneously upon the starting of the train. The starting was probably unexpected to her, and if so, she would naturally make some forward movement after the train started; yet if she did so, it might be said that she attempted to get off after the train started, and, under the theory of the instruction, she could not recover. The case is quite different from what it would have been if she had left her

NEGLIGENCE IN GETTING OFF CAR.

seat after the train started with a view of getting off, or had left the platform of the car after the train started with the view of getting off. It is by no means clear to our minds that what the plaintiff did, if anything, after the train started was negligence. This being so, we have to say that the question was for the jury, and we think it was fairly submitted, and that there was no error in refusing the instruction.

4. The court gave an instruction in these words: "If the plaintiff attempted to leave the coach while it was, to her knowledge, in motion, it would be such negligence on her part as to prevent a recovery. The defendant complains of this instruction by reason of the qualification in respect to the plaintiff's knowledge. It is manifest that the plaintiff could not be held responsible for incurring a danger of which she had no knowledge. The doubt, we think, if any, about the correctness of the instruction is as to whether, under the circumstances shown in evidence, the instruction is not too favorable for the defendant. If, by leaving the coach, the court meant leaving the inside of the coach, the instruction is clearly correct. But, under the plaintiff's testimony, the dangerous attempt, if any, was an attempt to leave the steps after the starting of the train, when she was in the very act of alighting. She doubtless had knowledge of the starting, but we are not prepared to say that her attempt, if any, after such knowledge should necessarily preclude a recovery. Where persons are in peril, and feel obliged to act upon the spur of the moment, they are not necessarily to be charged with negligence if they do not do the right thing. But, however this may be, we do not think that the defendant has any ground to complain of the instruction.

LEAVING WHILE TRAIN IN MOTION.

5. The defendant asked an instruction in these words: "If you find from the evidence that the plaintiff contributed to her injury by carelessly stepping down between the car and the platform, she cannot recover." The court refused the instruction, and the defendant assigns the refusal as error. In our opinion, the court did not err. It may be conceded that the instruction is correct, but it had been substantially covered by an instruction given. The court had already instructed the jury that "before the plaintiff can recover she must show that the injury was caused by the negligence of the defendant's employees, and also that she was at the time in the exercise of reasonable and ordinary care to avoid the injury."

REPETITORY INSTRUCTION REJECTED.

6. The court instructed the jury that the plaintiff was entitled to recover for reasonable expense incurred in nursing. It is objected by the defendant that there is no evidence that any such expense was incurred by her, and we have to say that we think that this is so. In our opinion, the court should not have given an instruction upon the theory that there was such evidence.

NURSING.

7. The court instructed the jury that the plaintiff was entitled to recover for loss of time occasioned by the injury. The evidence showed that the plaintiff was a married woman, and engaged in the dinary duties of a housewife, and not in any independent employment. It is objected by the defendant that it was the right of the plaintiff's husband, if of any one, to recover for such loss of time, and not the right of the plaintiff. If the question were an open one, the writer of this opinion would be inclined to think that a married woman, capable of earning money, should, in all cases of an actionable injury to her person, be allowed to recover for loss of time resulting from a disability caused by the injury; but it was expressly held otherwise in Tuttle v. Chicago, R. I. & P. R. Co., 42 Iowa, 518. Such being the doctrine of this court, the instruction cannot be sustained. Reversed.

LOSS OF TIME.

Alighting From Moving Train Not Considered Negligence.—For cases holding that the party injured was not guilty of negligence in attempting to alight from a moving train, see Iron Mountain R. Co. v. Mower, 3 Am. & Eng. R. R. Cas. 361; Lake Shore, etc., R. Co. v. Bangs, 3 Ib. 426; Penna. R. Co. v. Hoagland, 3 Ib. 436; Nashville, etc., R. Co. v. Erwin, 3 Ib. 465; St. Louis, etc., R. Co. v. Cantrell, 8 Ib. 198; Chicago, etc., R. Co. v. Bonifield, 8 Ib. 493; Smith v. St. Paul, etc., R. Co., 9 Ib. 262; Cumberland Valley R. Co. v. Mangans, 18 Ib. 182.

GEORGIA R.

v.

HOMER.

(78 *Georgia*, 251.)

Except in cases where the entire injury is to the peace, happiness or feelings of the plaintiff, worldly circumstances should not be admitted or weighed in the ascertainment of damages.

Where a passenger on a railroad train, who had delivered his ticket to the conductor, was subsequently ejected by the latter, who took him by the arm, led him to the platform, and he thereupon got off, although this was done kindly, and he did not resist so as to require violence, yet the jury might find exemplary damages. The inconvenience, insult in the presence of fellow passengers, and wounded feelings of the person ejected could be considered by the jury.

Extraordinary diligence is the measure of care which conductors must exercise towards passengers.

There was no error in ruling out what plaintiff said as to another person's conduct in correcting a mistake as to that person's ticket, or the price of it, it not being said in the presence of the conductor or communicated to him, but being said at or near the ticket office, before the plaintiff entered the car.

There was no error in the court's stating to the jury that no power on earth could set aside their verdict, if made under the circumstances stated, which

meant what the law and facts authorized. Larceny is a *crimen falsi*, and the record of a conviction for larceny is admissible to discredit a witness.

In case of the ejection from a railroad train of a passenger who had previously delivered up his ticket, and who sues for damages on account of such ejection, the presumption is against the company; and it devolves on it to show that the conductor, who put the passenger off, acted rightly and under authority of law, and thus to lift the burden cast upon it by law.

The illegal ejection of a passenger entitled by contract to be carried over a railway is itself an act for which damages are recoverable. The measure is for the jury.

While the good faith of a conductor, who improperly ejected a passenger, would not defeat the right to recover damages therefor, yet it might be considered in fixing the amount of such damages; and bad faith on the part of the conductor might be considered to increase the damages.

Before Judge HAMMOND. DeKalb Superior Court.

Homer brought suit against the Georgia R., alleging that he had been wrongfully ejected from defendant's train after having purchased and delivered to the conductor a ticket to his destination; that he was put out in an old field, away from a crossing, and in the rain. He laid his damages at $3000.

On the trial, the evidence for the plaintiff was, in brief, as follows: Plaintiff lived at Stone Mountain, but worked at Lithonia, a station further down the road than his starting point, which was Decatur. He purchased a ticket from Decatur to Lithonia and delivered it to the conductor, on demand, before reaching Stone Mountain. After passing that point, the conductor again called for his ticket. He replied that he had given up his ticket. The conductor denied this, said plaintiff had just got on the train and was trying to beat his way, and stopped the train, caught plaintiff by the arm and put him off. It was about seven o'clock in the evening and was dark and raining. It was from thirty-five to fifty yards from where a small road crossed the railroad. Plaintiff went to a house about one hundred yards distant, where he had formerly boarded, and stayed all night without cost. He had been attending court in Decatur as a witness, and had gone thither by private conveyance.

The evidence for the defendant was, in brief, as follows: Plaintiff and several others purchased tickets at Decatur to Stone Mountain. Two of them expressed an intention of "beating" their way to their places of destination below that point, and plaintiff said he intended to "beat" his way to Lithonia. After passing Stone Mountain, the conductor called for his ticket to Lithonia. He claimed to have already given it up. The conductor denied this, and told him he must pay or get off. Plaintiff felt in his pockets, and said he had no money. The conductor rang the bell, stopped the train and accompanied plaintiff to the steps of the car with his lantern. After the plaintiff was off, the conductor asked if he was all right, and, receiving an affirmative answer, the

train proceeded. There was only one other passenger in the car at the time. The conductor did not put his hand on the plaintiff; he would have called for assistance if it had been necessary, but it was not. He testified that he did not see plaintiff until after the train left Stone Mountain. Plaintiff explained that some water on his hat had got there from his having put his head out of the window into the rain.

The record of a conviction of the plaintiff, on plea of guilty by him, for larceny from the house, was put in evidence. It was dated about four years before the trial, and was from another county.

The jury found for the plaintiff $300. Defendant moved for a new trial on many grounds, but the following will show the points decided by the court:

(1.) Because the verdict was contrary to law and evidence, and the damages were excessive.

(2.) Because the court admitted, over objection, evidence to show that the defendant was worth about $5,000,000 above its indebtedness.

(3.) Because the court refused to charge, in effect, that, although the conductor may have been mistaken about having taken the ticket of plaintiff, yet if he acted in good faith and without violence or insult, only actual or nominal damages could be recovered; but charged as follows: "The question of the conductor's good faith and belief would not affect the plaintiff's right to recover, but might affect the amount of damages that the plaintiff would be entitled to recover, as the court will explain to you."

(4.) Because the court refused to charge as follows: "While plaintiff was not obliged to resist forcibly any force used to expel him in order to have a claim against the defendant for damages, yet, before he can claim to have been ejected from the train, there must appear to have been some compulsion greater than words; there must have been some force, however slight, or some display of sufficient force. Obedience by plaintiff to a mere unlawful order of the conductor would not sustain an action for forcible expulsion, so as to allow exemplary damages or any more than actual damages or nominal damages,"

(5.) Because the court refused to charge as follows: "The conductor would be bound not to extraordinary, but to only ordinary diligence in keeping and remembering about the identity of passengers and tickets, just like other persons conducting business with each other; that is, in the light of reason and according to the nature and circumstances of the business in hand." [The court charged, in substance, that the rule of extraordinary diligence would apply.]

(6.) Because the court charged as follows: "When you have done that (*i. e.*, determined whether there was any injury and what

would compensate for wounded feelings or injury to peace and happiness), and your verdict is free from any bias, prejudice or feeling for or against the parties, there is no power on earth that can set it aside; you alone are the judges of what is fair and right in such case."

(7.) Because the court rejected the following testimony of a witness for the defendant: "As we went from the ticket office to the car, Homer said to me that he would not have said anything about the mistake in making the change if he had been me." [The witness had testified that he purchased his ticket at the same time as did the plaintiff; that the agent made a mistake in giving him change; and that he called attention to it, and it was corrected.]

The motion was overruled, and defendant excepted. Plaintiff filed a cross bill of exceptions, alleging the following errors:

(1.) Because the court admitted in evidence the record of the conviction of plaintiff for larceny from the house. The objection was that it was irrelevant.

(2.) Because the court refused to charge as follows: "If you believe from the evidence that the plaintiff was illegally ejected from the defendant's train, the [law] presumes that it was in consequence of the [want of] use of the diligence required by law of the defendant, its agents and employees, in the transportation of passengers; and it would be incumbent on the defendant, by proof, to show that they had used that degree of diligence required of them by law, to wit, extraordinary diligence."

And because the court charged as follows: "If it (the testimony) be equally balanced, then the plaintiff's case fails, and he could not recover," and added, after charging that, in case of injury by the running of trains, the presumption of law is against the company, these words: "But not so in a case like the one you are trying, where the alleged injury is for a refusal to perform a contract to carry a passenger, as is alleged here, and the burden of proof is not on the railroad company, but is on the plaintiff."

(3.) Because the court refused to charge as follows: "If the evidence shows that the plaintiff was illegally ejected from the cars of the defendant, the law presumes he was damaged."

(4.) Because the court charged as follows: "If you find from the evidence that the conductor did expel the plaintiff from the train, but that he acted in perfect good faith, that is, that he really and truly believed plaintiff had not paid his fare or delivered up his ticket to a point beyond where he was expelled, then you would consider that, in making up your minds as to the amount of damages plaintiff is entitled to."

L. J. Winn for plaintiff.

J. B. Cumming, Hilyer & Bro., Candler, Thomson & Candler for defendant.

JACKSON, C. J.—This is an action for the recovery of damages brought by Charles Homer against the Georgia R. & Banking Co. for ejecting the plaintiff from the cars between Decatur and Lithonia, though he had given to the defendant's conductor a ticket purchased at Decatur through to Lithonia. The jury found for the plaintiff three hundred dollars, and the railroad company being denied a new trial, excepted; and Homer also excepted, and assigned errors in a cross bill of exceptions.

1. There is one error assigned in the bill of exceptoins brought by the company, which, in our judgment, demands a new trial, under the ruling in Higgins *v.* The Cherokee R. Co. decided during the present term. That is the admission of the testimony in regard to the immense wealth of the Georgia R. & Banking Co. We think that juries are disposed enough ordinarily to find against railroad corporations, without helping them to do so, and to increase the damages because they are so enormously rich, and in order to multiply the damage to admit testimony detailing that wealth. Except in cases where the entire injury is to the peace, happiness or feelings of the plaintiff, where, under section 3067 of our Code, the worldly circumstances of the parties are admissible to be weighed by the jury, as was the common law, we think worldly circumstances should not be weighed or admitted to be weighed. What effect this evidence may have had in contributing to the amount of the verdict we cannot tell. We do not say that it is or that it is not excessive, but we simply rule that it should not be increased, as it might have been, by illegal testimony tending to induce the jury to increase the damage.

ADMISSION OF EVIDENCE CONCERNING WEALTH OF DEFENDANT.

2. We see no error in the charge that exemplary damages might be recovered with or without actual force in a case like this. The conductor took the passenger by the arm and led him to the platform, and he got off. All was done kindly, but by the commanding authority of the conductor. The passenger lost nothing by not resisting and requiring force to eject him. On the contrary, he was right to yield to authority and throw himself for remuneration upon the law. Of course, rude and violent conduct would be a circumstance to demand increase of damages against the company, but more than actual damage is recoverable for the act of putting off, by the mere moral force of authority, a passenger who had a ticket and was entitled to ride to Lithonia, before he got there. The inconvenience, the insult in the presence of fellow passengers and the wounded feelings of the passenger, may be considered and weighed. Code, § 3066. The act, without considering the intention, may be aggravating; and certainly it is very aggravating, where one has bought a right to be transported to Lithonia, for him to be ejected in a field where

RECOVERY OF EXEMPLARY DAMAGES.

there was no depot, or crossroad even, before he reached his destination. Code, § 3066, *supra.*

3. Extraordinary diligence is the measure of care which conductors must exercise towards passengers, and there is no error in so charging the jury. It has been expressly so ruled by this court, and other authority is unnecessary to be invoked. Code, §§ 2067, 2083; 34 Ga. 330; 58 Id. 461, and following cases.

4. There was no error in ruling out what plaintiff's saying was as to another person's conduct in correcting a mistake as to that person's ticket or the price of it, it not being said in presence of the conductor or communicated to him, but at the Decatur ticket office, or near it, before entering the car. It was no part of the *res gestæ*, or otherwise admissible. Nor can we see error in the court stating to the jury that no power on earth could set aside its verdict, if made under the circumstances stated, which meant simply what the law and facts authorized.

5. In respect to the cross bill of exceptions, we think that the court properly admitted the record of the plaintiff's conviction of larceny from Hall county. It is a conviction of a "*crimen falsi*," and evidence tending to discredit the plaintiff's testimony.

6. In this, as in all such cases, the presumption is against the agent of the railroad company, and it devolves on the company to show that the conductor acted rightly and under authority of law, and thus to lift the burden cast upon it by the law.

7. The illegal ejection of a passenger entitled by contract to be carried over a railway is itself an act for which damage is recoverable. The measure is for the jury.

8. On the point of good faith in the conductor, we think that, while it does not in law defeat the right to recover damage, yet it may be considered in making up the amount thereof. Just as the company would be responsible for his intention to do wrong, which is bad faith, and the damages be therefore increased under section 3066 of our Code, so it ought to receive credit for his good intention, and the damage should not be so high where its agent acted *bona fide.*

This covers all the points made in both bills of exceptions. The judgment is reversed, and a new trial awarded on the ground of error in admitting evidence of the wealth of the plaintiff in error, the costs of the original bill of exceptions to be paid by the defendant in error to that writ of error, and of the cross bill by the defendant in error to that writ of error.

Judgment reversed.

Recovery of Exemplary Damages for Ejectment of Passenger.—See Murphy *v.* Western, etc., R. Co., 21 Am. & Eng. R. R. Cas. 258; Holmes *v.* Carolina Central R. Co., 26 Ib. 190, and note, Philadelphia, etc., R. Co. *v.* Rice, 26 Ib. 264.

BECKWITH
v.
CHESHIRE R. Co.

(Advance Case, Massachusetts. November 24, 1886.)

When proper cause exists for removal of a passenger from a railroad train, Mass. Pub. Stat. chap. 112, § 197, does not prohibit the company from putting him off the train at a regular passenger station, without arresting him.

Where a child of nine years of age enters a passenger train with her mother, who has provided herself with a ticket, the child is a passenger, whether the contract of carriage, if any, is made with her, or with her mother, and as such she is not entitled to be carried unless paid for.

ON defendant's exceptions. Sustained.

Action of tort for a forcible ejection from defendant's passenger car.

The plaintiff, a child nine years old, in company with her mother, entered the defendant's passenger car at Fitchburg, intending to go to Marlboro, N. H. The mother purchased a ticket for herself, but none for the plaintiff, and though each was provided with sufficient money to pay such fare, they refused, upon several demands by the conductor for half fare for the plaintiff, to pay any fare for her. The defendant's regulation, well known to the plaintiff and her mother, required the payment of half fare for a child between the ages of five and fourteen years.

The conductor, having previously warned the plaintiff, removed her from the train at a regular station, using as little force as possible, leaving the plaintiff on the platform with her mother, who had followed her, after telling them that if the fare was then paid the plaintiff might continue the journey.

The defendant asked the presiding judge to instruct the jury that, if they believed the defendant's evidence, the plaintiff could not recover. This instruction was refused and the jury was instructed that, even if the defendant's evidence, substantially as above set forth, was true, the defendant would be liable to the plaintiff in nominal damages.

The defendant then requested the presiding judge to rule that, if the jury believed the defendant's evidence, the plaintiff was entitled to nominal damages only, which instruction was also refused.

The presiding judge, in the charge to the jury, read § 197 of chap. 112 of the Public Statutes, and ruled that the only legal method of removing a person from the car of a steam railroad

corporation for non-payment of fare was by a railroad police officer, whose duty it was, upon the arrival of the train at some station, to place such person in charge of an officer to be taken to a place of lawful detention. And inasmuch as the plaintiff was otherwise removed, the defendant, by reason solely of its neglect to comply with the provisions of said last-named statute, was guilty of an assault upon the plaintiff, for which she was entitled to nominal damages. The jury returned a verdict for the plaintiff for the sum of $250.

The presiding judge charged the jury in other respects in a manner not objected to, but to the refusal to give the two requests for instructions above referred to, and to the ruling above set forth the defendant alleged exceptions.

George A. Torrey for defendant.

Pierce & Stiles for plaintiff.

Holmes, J.—We agree with the argument of the counsel for the defendant, that if the meaning of the words of Pub. Stat. chap. 112, § 197 (Stat. 1874, chap. 372, § 150) "no person shall be removed from a car of a steam railroad corporation except as provided in chap. 103, § 18" (Stat. 1874, chap. 372, § 146), had been to take away the right of such corporation to remove from a train a person who does not pay his fare, without arresting him, as provided in the section referred to, there would have been no reason for adding the further words "nor from a train except at a regular passenger station." If the passenger is arrested, chap. 103, § 18, requires the removal to be not only at a station, but at a station where the passenger can be placed in charge of an officer, etc.

The statute seems to us to speak of removal from a car by way of partial antithesis to removal from a train, and to refer to such removals from a car as are provided for in chap. 103, § 18, that is, to removals "to the baggage or other suitable car of such train." We are of opinion that when proper cause exists for removal, but the company does not deem it necessary to arrest the passenger, the statute does not prohibit putting him off the train at a regular passenger station without arresting him.

Apart from the clause which we have construed, there is no doubt of the company's right to put off the infant. Whether the contract for her carriage, if any, was made with her or with her mother, she was a passenger, and as such was not entitled to be carried unless paid for. Pub. Stat. chap. 112, § 197. She did not stand on the same footing as her mother's parasol, as was suggested by her counsel.

Exceptions sustained.

Rights of Children on Train in Charge of Parents.—If a person having a child in charge refuses to pay its fare when demanded, not only the child,

but the person so having it in charge, although he has paid his fare, may be expelled from the train. Wood's Railway Law, § 353.

A passenger on a railway train is responsible for the fare of a child under his charge, and may, upon refusal to pay the same, together with the child, be ejected from the train, although he has paid his own fare; and if a conductor on a railway train finds a child sitting beside a female passenger, and knows that the father of the child is in the car, or could know upon proper inquiry, he has no right to hold the female passenger responsible for the child's fare. Philadelphia, etc., R. Co. *v.* Hoeflech (Md.), 1884, 18 Rep. 822.

PRESIDENT, ETC., OF THE BALTIMORE & YORKTOWN TURNPIKE ROAD

v.

LEONHARDT.

(*Advance Case, Maryland. June* 24, 1886.)

The plaintiff was a passenger on one of defendants' street cars. The car was of the kind usually called a double-decker, having two compartments for passengers, one above the other. As the car was crossing a bridge the plaintiff arose from his seat in the forward part of the upper section, and walked towards the rear, for the purpose of descending the platform, desiring to leave the car after it had passed the bridge. While walking in this manner his elbow came in contact with a portion of the bridge, which caused severe injury. The evidence showed that the portion of the truss which struck the plaintiff was distant about two inches from a perpendicular line drawn from the floor of the upper deck at the side next the bridge. In an action to recover damages for such injury it was *held*,

1. That the defendant was guilty of negligence, and was liable for the injury; that the fact that the passenger was injured while moving about on the floor of the car when it was in motion is not presumptive evidence of negligence on his part.

2. That where an injury occurs to a passenger, in an action for damages the burden of disproving negligence is on the defendant.

3. That the company could not exempt itself from responsibility by showing that its tracks were located by authority of the city.

4. That evidence by a mechanic as to what contrivance would have rendered the car safe was unobjectionable.

5. That it was not relevant to ask a witness whether an accident had ever happened before to a passenger on the upper deck of one of these cars.

6. That it was not error for the court to refuse to allow the question asked the driver of the car, whether, "according to the best of his recollection, he had on the day of the accident observed his practice of bringing his horses to a walk in crossing the bridge," when he had already testified that "he had no recollection on the subject, except that it was his practice to go over the bridge carefully and slow."

7. That the defendant could not make its own instructions to its conductors a matter of defence by asking one as to the practice in reference to stopping the cars at the request of a passenger, and also as to the instructions which he had received as conductor.

APPEAL from Baltimore City Court.
A. W. Machen for appellant.
James Pollard and *H. W. Latane* for appellee.

BRYAN, J.—The appellant is a corporation owning a railway on which cars for the transportation of passengers are drawn by horses. The railroad tracks traverse some of the streets of Baltimore, and extend as far as Towson. While a passenger in one of the appellant's cars, the appellee sustained bodily injuries, and he has brought this suit for the recovery of damages. There is very little controversy about the facts of the case. The car in which the appellee was a passenger was of the kind usually called a double-decker, having two compartments for passengers, one above the other. Two of the appellant's tracks cross an iron bridge over Jones' Falls—one on the north side, and the other on the south side, where Hillen street meets Pleasant. The appellee was occupying a seat in the upper section of the car, at the extreme front, nearest the driver. When the car reached Front street, about a hundred feet east of the bridge, he rose from his seat, and walked towards its rear end, for the purpose of descending to the platform, desiring to leave the car shortly after it should have passed the bridge. While walking in this direction, with his back, of course, towards the driver, his right elbow came in violent contact with a portion of the bridge. He received an injury which is described by a medical witness as a fracture of one of the inner bones of the arm, with considerable straining of the ligaments. The bridge is divided by a central truss or abutment, on each side of which the tracks run. It is stated in the evidence that each track is 24 inches from this central truss, and that the side of the ordinary standard car is from 11 to 12 inches distant from it, and that the upper deck or portion of a double-decked car projects considerably over the lower portion, and its side is distant 5 inches from the truss. There is an iron plate or box on the side of the truss, with some ornamentation, which extends two inches and a quarter outward. It will be seen that at this particular point the distance is two inches and three quarters to a perpendicular line drawn from floor of the upper deck at the side next the bridge. These measurements are given by different witnesses with slight variation; but the purposes of the case do not require a more minute examination of these details. FACTS.

Evidence was offered tending to show that the horses were trotting when the cars crossed the bridge, and an ordinance of the city of Baltimore was proved which provided that horses should not be driven over any of the bridges of the city at a gait faster than a walk. There was also evidence of a notice forbidding passengers to get on or off the cars while they were in motion. The mutual obligations existing DUTY OF PASSENGER CARRIERS—CONTRIBUTORY NEGLIGENCE OF PLAINTIFF.

between passengers and the public carriers who transport them have frequently been declared by the courts. The carrier does not warrant the safety of his passengers at all events; nevertheless, as far as human care and foresight can avail, he is bound to transport them safely. On the other hand, the passenger is bound to observe the reasonable rules and regulations made by the carrier for insuring the safety of passengers; and, of course, cannot be relieved from the necessity of using ordinary care and prudence on his part to avoid danger. There ought to be no difficulty in leaving these inquiries to the jury, where the evidence presents a proper case for their consideration. If, indeed, the conduct of the plaintiff below showed a reckless disregard of his safety, it was the duty of the court to declare, as matter of law, that it was such negligence as entitled the defendant to a verdict; but, if this were not the case, it was proper to leave it to the jury to decide whether he used such a degree of prudence as the occasion required. When a person leaves a car while it is in motion, he is affected by its momentum, and incurs more or less danger. It therefore seems to us a reasonable safeguard against accidents to forbid departure from the car at such a time. But the plaintiff was not violating this rule of the defendant when the accident occurred. He was walking on the upper floor of the car, on his way to the place where he was to descend to the lower platform. When he reached this platform, he would be in a position to depart from the car, and he would then be required to see that it was stopped before he left it. But, surely, it is very anreasonable to deny to a passenger the right to move about on the floor of a car while it is moving; and the concurring experience of the travelling public will show that such restraints are not imposed. It does not seem to us that we can declare that the act of the plaintiff was in law inexcusable negligence. It was a matter which the jury were properly required to consider in connection with the circumstances existing at the time; and, if they thought that it showed a want of reasonable caution, it was their duty so to find by their verdict.

The prayers offered at the trial which refer to the duty of the defendant require a careful examination.

The fifth on the part of the defendant presents the most important question in the case. It is in these words:

"The burden of proof, under the issues in this case, is upon the plaintiff to satisfy the jury that the injury which he complains of was produced by negligence on the part of the defendant; and, if the jury do not find from the evidence that it was produced by negligence on the defendant's part, then their verdict should be for the defendant."

BURDEN OF PROOF.

The court, by granting the plaintiff's first prayer, imposed on him the burden of proving that the injury was caused by the negligence of the defendant, and, by granting the defendant's sixth,

seventh, ninth, and eleventh prayers, instructed the jury in very clear and positive terms that the plaintiff's right of recovery would be defeated if there was on his part any want of ordinary care which directly contributed to produce the injury. The majority of the court hold that, inasmuch as these instructions presented the case to the jury as favorably for the plaintiff as he had a right to require, the rejection of this prayer is no cause for a reversal. The writer of this opinion thinks, nevertheless, that it is better to consider on its own merits the legal proposition involved, and herein he desires to be understood as expressing merely his own views. It may be said that the plaintiff is bound to establish by evidence all the material averments in his declaration, and, as he has averred the defendant's negligence as the foundation of his action, the burden of proof is upon him to establish it. The proposition is most true when abstractly considered; and yet abstract propositions most usually mislead and perplex the judgment when they are stated without reference to the circumstances which justly modify their application. Let us consider the facts to which this prayer was applied. It was not controverted that the plaintiff had received an injury while travelling as a passenger in one of the defendant's cars. Indeed, the very terms of the prayer assume these facts. They do not ask that the jury are to find whether the plaintiff was injured, but, proceeding on the basis that the injury had been inflicted, they seek to instruct the jury as to the rule by which they are to decide the question of negligence. They say that under these circumstances the burden of proof is on the plaintiff. The contrary is the established law of the State. It being the duty of the carrier to convey his passengers safely, so far as it can be done by human care and foresight, when he has failed to convey them safely it is held that he must show that he has exercised all that care and foresight which were required of him by his contract with them.

In Stokes *v.* Saltonstall, 13 Pet. 181, where an action was brought by the plaintiff to recover damages for injuries received by his wife from the upsetting of a stage-coach in which she was a passenger, the first instruction given by the court at *nisi prius* stated that the facts that the coach was upset, and the plaintiff's wife injured, were *prima facie* evidence that there was carelessness or negligence or want of skill on the part of the driver, and that they threw upon the defendant the burden of proving that the accident was not occasioned by the defendant's fault. This ruling was approved by the Supreme Court. In its opinion the court refers with approbation to Christie *v.* Griggs, 2 Camp. 79, where it was held that the plaintiff made a *prima facie* case by proving his going on the coach, the accident, and the damage he had suffered. Both of these cases have repeatedly received the sanction of the court. In Baltimore & O. R. Co. *v.* Worthington, 21 Md. 275, where an injury to a passenger was caused by the dis-

SAME—AUTHORITIES.

placement of a switch on the railroad track, the court approves an instruction to the jury to the following effect, as stated in the opinion: "That the injury to the plaintiff was presumptive evidence of negligence on the part of the defendants, and it was incumbent on them to prove that they were not negligent in order to discharge themselves from liability." In Baltimore & O. R. Co. *v.* State, 63 Md. 135, an action for negligent killing, the plaintiff's second prayer maintains that if the deceased was killed while occupying the relation of a passenger, the presumption was that the injury resulted from the negligence of the defendant, unless the defendant showed that the injury did not result from its negligence, or that it could have been avoided by ordinary care on the part of the deceased; and this court held that it was properly granted. The opinion of the court refers with approval to Christie *v.* Griggs, *supra;* Stokes *v.* Saltonstall, *supra;* Stockton *v.* Frey, 4 Gill, 406; Carpue *v.* London & B. R. Co., 5 Q. B. (48 E. C. L.) 749; Skinner *v.* London R. Co. 5 Exch. 786. In Carpue's case, Lord Denman ruled at *nisi prius* that the plaintiff proved a *prima facie* case of negligence against defendants by showing that when the accident occurred the train and railway were exclusively under their management. A rule *nisi* for a new trial on the ground of misdirection having been obtained, at the argument in the King's Bench the eminent counsel for the defendant gave up the point. In Skinner's Case, where one railroad train ran into another, and a passenger in the first train was injured by the accident, it was held that the fact of the accident was *prima facie* evidence of negligence on the part of the carrier.

These citations show the state of the law in Maryland on the question presented by the fifth prayer of the defendant. We are aware that highly respectable authorities elsewhere hold otherwise; but we are bound by our own decisions, and, moreover, they are agreeable to reason. It was not the meaning of this prayer that the burden rested on the plaintiff to prove the accident and the injury, and that he was a passenger. These facts were not contested at the trial, and yet they were all which it was necessary for the plaintiff to show for the purpose of casting on the defendant the burden of disproving negligence. The meaning of the prayer was, and its understanding by the jury necessarily would be, that, notwithstanding the fact of the injury, the burden of disproving negligence was not thrown on the defendant.

What we have said will sufficiently indicate our view on the various prayers, and on some of the questions presented by the exceptions to evidence. It being the duty of the defendant to observe the degree of care which we have stated, it could not exempt itself from this responsibility by showing that its tracks were located by the authority of the city of Baltimore. If the tracks were unsafe, it could not properly use them in the transportation of passengers. We do not

LOCATION OF TRACKS DOES NOT RELIEVE COMPANY FROM LIABILITY.

understand, however, that it is alleged that the ordinary standard car could not safely pass over this bridge. The danger is supposed to arise from the fact that the double-decker projected so far beyond the limits of the ordinary car as to leave too small a space between it and the truss of the bridge; and certainly the space, two inches and three quarters, as stated in the evidence, was very small. It would be impossible to tell a jury that this was no evidence of negligence.

The first exception was taken to the refusal of the court to allow the defendant to show that it was practicable for a person of ordinary activity to descend from the upper deck of the car without injury while the car was passing the bridge, if he were careful. It might be practicable with a great degree of care, and yet it might be that the ordinary care which the law requires would be insufficient for the passenger's safety. But, independently of this consideration, we may remark that the question of care was a matter for the decision of the jury, and this offer was a reference of the question to the opinion of a witness. It is proper to lay before the jury all the facts which are necessary to enable them to form a judgment on the matters in issue; and, when the subject under investigation requires special skill and knowledge, they may be aided by the opinion of persons whose pursuits or studies or experience have given them a familiarity with the matter in hand. But where the question can be decided by such experience and knowledge as are ordinarily found in the common business of life, the jury are competent to draw the proper inferences from the facts, without having the opinions of witnesses. In this case every fact and circumstance could readily have been proved which showed whether the attempt to descend from the upper deck was safe or dangerous, wise or reckless, cautious or rash; and upon these facts the jury were required to form their judgment. There are, however, cases where all the facts cannot be detailed to the jury which are necessary for a proper understanding of the subject. In speaking of a precipice, or of the condition of a road, which is founderous or dangerous for travel, or of numbers, weights, heights, distances, and other like subjects, it would rarely be practicable for a witness to give the jury a satisfactory idea of the thing described without stating his opinion of them; but, where the facts can be adequately exhibited to the jury, it ought to be done without admitting the evidence of opinion.

CARE REQUIRED IN ATTEMPT TO DESCEND FROM UPPER DECK.

These observations apply also to the second, third, and eleventh exceptions.

We think the evidence offered by the plaintiff in the fourth exception was unobjectionable. A mechanic was permitted to state what contrivance would have rendered the car safe in passing over

the bridge. It was an inquiry in which technical skill and knowledge were involved.

We do not think that it was relevant to ask a witness whether an accident had ever before happened to a passenger on the upper deck of one of these cars. The jury were trying the merits of this particular accident, and none other. We therefore approve of the ruling in the eighth, fifteenth, and twenty-second exceptions.

In the fourteenth exception the court refused to permit the defendant to ask the driver of the car whether, according to the best of his recollection, he had, on the day of the accident, observed his practice of bringing the horses to a walk in crossing the bridge. The witness had already testified that he had no recollection on the subject, except that it was his practice to go over the bridge carefully and slow. There was no error in this ruling.

In the twenty-third exception the defendant offered to ask a conductor as to the practice in reference to stopping the cars at the request of a passenger, and also as to the instructions which he had received as conductor, and as to the instructions to other conductors on the subject. We do not see how the defendant can make its own instructions to its conductors a matter of defence. It is responsible for their conduct while acting in the course of their employment, even if they disobey their instructions; and, if improper instructions are given, this fact may be shown adversely in an action against the employer.

We have given our views on all the material questions in the case. With respect to others not adverted to it is sufficient to say that we have given them our careful attention, and agree with the learned judge who tried the cause. We approve of all his rulings. Judgment affirmed.

Liability for Injury to Passengers struck by projection at side of track.—Most of the cases in which this question has arisen, have been those where passengers have allowed their arms to protrude from the car window. The weight of authority in these cases is to the effect that if a passenger allows his person to extend beyond the line of the side of the car, he is guilty of contributory negligence, and cannot recover for any injuries he may receive. See Dun *v.* Seaboard, etc., R. Co., 16 Am. & Eng. R. R. Cas. 363, and note; Dahlberg *v.* Minneapolis St. R. Co., 18 Ib. 202, and note; Germantown Pass. R. Co. *v.* Broply, 16 Ib. 361; Farlow *v.* Kelley, 11 Ib. 104, and note; Hallahan *v.* New York, etc., R. Co., 26 Ib. 169.

West Philadelphia Passenger R. Co.

v.

Gallagher.

(108 *Pennsylvania State*, 524.)

It is not contributory negligence *per se* for a passenger to ride on the lower step of the front platform of a crowded street car without objection by the driver or conductor.

A boy under fourteen got upon the lower step of the front platform of a crowded street car and rode for a long distance as a passenger, holding on with but one hand. He was finally knocked off by the jolting of the car, run over and injured. In an action against the street-car company to recover damages, *held*, that the questions of negligence and contributory negligence, taking into consideration the age and capacity of the lad, were both for the jury.

The absence of a guard or fender on the front platform of a street car is a fact which may be taken into consideration with other facts in determining the question of the company's negligence. The court will not, however, say, as a matter of law, that it is negligence on the part of the company not to furnish such a guard.

In the above case the court instructed the jury that if they were of opinion that the existence of a fender or guard would have prevented the accident, they were at liberty to find that the company was negligent in failing to provide it. *Held*, that this was error, as it was tantamount to saying that it was the duty of the company to provide the fender or guard.

Before Mercur, C. J.; Gordon, Paxson, Trunkey, Sterrett, Green, and Clark, JJ.

Error to the Court of Common Pleas, No. 4, of Philadelphia county.

This was an action on the case, by James S. Gallagher, a minor, by his next friend, Rudolph Steinle, against the West Philadelphia Passenger R. Co., to recover damages for personal injuries, caused by the alleged negligence of the company defendant. Plea, not guilty.

On the trial, before Arnold, J., the following facts appeared:

The plaintiff, a boy under fourteen years, got on the car of the defendant company, which was very much crowded. He took a position on the lower step of the front platform, holding on by only one hand, with his left foot on the step and the right one on the platform; in this position he rode for twenty-two squares with safety, but when near his destination lost or let go his hold, and losing his balance, on reaching the ground fell, so that his leg got under the wheel, was crushed, and necessarily had to be amputated near the knee joint. The car was a two-horse one, and the driver

collected the fares. It had no guard or fender to the front platform, and at the time of the accident was travelling at a rapid rate of speed over a portion of the road on the down grade, which made the car rock. The testimony of plaintiff's witnesses was to the effect that the car was going no faster than ordinarily for that part of the road in the open country, and that while the car rocked it was the usual rocking motion at that rate of speed.

The court charged the jury, *inter alia*, as follows:

"In this case it is alleged that the plaintiff is under the age of fourteen years. In that case, the case of a minor under fourteen, the question is properly submitted to the jury to inquire whether he has that knowledge, experience, and discretion which would inform him of the danger of the position he was in, and call from him the same care and precaution that would be expected of a person of mature years. Therefore, I say to you upon that point, if you find that the boy had enough knowledge and discretion and experience to know he occupied a place of danger, and that he voluntarily occupied it, then he would be charged with contributory negligence, and upon his part being guilty of contributory negligence, and chargeable with it, he cannot recover from the company. I therefore refer to you the question whether or not the boy was of sufficient strength of mind to know the danger he assumed, and whether he assumed that danger voluntarily. . . .

"But if he were pushed off by the ordinary pressure of a crowd of passengers upon the car, or the efforts of passengers to get off at the terminus, that being the ordinary and usual pressure that might be expected in a crowded car, then the company would be liable in having omitted the precautions that a company ought to take to protect its passengers situated such as this boy was on this day. . . .

"There is another point in the case which is the vital point, I think, in the case. That relates to the question of a gate or guard or fender, or, as it is called, a screen. The courts have not gone so far as to say as a matter of law that it is the duty of a railroad company to put gates or screens upon the front platforms of cars, but they have said that the absence of gates, fenders or screens is a fact to be taken into consideration by the jury in determining whether or not there has been any carelessness or omission of care on the part of the railroad company. If, therefore, you are of the opinion that a fender or guard put upon that car, or, if upon that car on that day, would have prevented this accident, and that there was no guard or fender there, then you are at liberty to say that the company was careless in omitting to have it. I refer to the jury to say as a matter of fact whether the absence of a guard contributed in any way to the injury of the plaintiff. I refer that fact for you to determine."

Verdict for the plaintiff for $8000, and judgment thereon.

Whereupon defendant took this writ, assigning for error, *inter alia*, that portion of the charge above cited.

Rufus E. Shapley for plaintiff in error.

L. C. Cleeman and *Pierce Archer* for the defendant in error.

TRUNKEY, J.—There is little conflict of testimony respecting the number of passengers on the car at the time the plaintiff was hurt. The person who acted as conductor says there were between forty-five and fifty, eight or nine of whom were on the front platform. Passengers, whether called by plaintiff or defendant, agree that the car was crowded, and that more might have got on—the conductor thinks he could have shoved on seventy, and then it would have been pretty well packed. He also testifies that eight or ten boys were on the car, and that he saw none of them standing on the step of the front platform, nor on the platform itself except in the door. While the car ran from Forty-first street to Sixty-second, the plaintiff stood on one of the front steps, and either the crowd or something else kept him from the conductor's view. Had the conductor seen him, he might have considered it his duty, under the rules of the company to have placed him in a position of greater safety. It appears that the rocking motion of the car was increased by the platforms being loaded with passengers; also that the car at the time of the accident was running down grade quite as fast as the usual rate of speed when the passengers could all be seated. One of the witnesses, who had been a driver on that road, says the rocking was not unusual with a loaded car, but was unusual with a car not so heavily loaded. The front platform was without gates or fenders. The plaintiff was nearly thirteen years and two months old. FACTS.

The fact that the front platform was not enclosed with a screen or fender is a matter proper to be considered with other facts in the case, in determining whether or not the defendant was guilty of negligence in allowing the front door to remain open, and the front platform to be crowded with passengers, some of whom were children. It was the duty of the defendant to exercise reasonable care and vigilance to carry the plaintiff safely. If, on account of the plaintiff's age and inexperience, he was incapable of taking proper care of himself, the defendant was bound to exercise the highest care and vigilance necessary and proper to secure his safety. Phil. City Pass. R. Co. *v.* Hassard, 75 Pa. St. 367. These principles apply to the duty of passenger railway companies in relation to passengers, and are not militated by rulings in cases where children got on or attempted to get on the front platforms, under circumstances which, had they been of mature age, would have shown them both trespassing and negligent, and which showed no negligence on the part of the companies. GATE TO FRONT PLATFORM—PLAINTIFF'S AGE.

WHAT CONSTITUTES NEGLIGENCE—CONTRIBUTORY NEGLIGENCE OF CHILDREN.

There is no absolute rule as to what constitutes negligence. Where a higher degree of care is demanded under some circumstances than under others, when the standard shifts with the circumstances of the case, when both the duty and the extent of its performance are to be ascertained as facts, a jury alone can determine what is negligence and whether it has been proven. Crissey *v.* Railway Co. 75 Pa. St. 83. Where concurrent negligence is alleged, a child will not be held to the exercise of the same degree of care and discretion as an adult. The law does not presume that an infant is responsible for negligence until after he arrives at fourteen years of age. Nagle *v.* Railroad Co. 88 Pa. St. 35.

NOT NEGLIGENCE PER SE TO RIDE ON FRONT PLATFORM.

It has been ruled in this and other States that it is not negligence, *per se*, for a passenger to ride on the front platform of a crowded car, with consent of the driver or conductor. Why should negligence be imputed to him? The railway companies invite passengers to get on, receive the fare, and thus hold out the platform as a safe place for passengers. That it is as safe as inside the car, nobody pretends. But the carrier who receives the passenger, and the compensation for carrying him, does not allege contributory negligence in the passenger for taking the place, provided he alleges that the place is safe, with due care and vigilance. Then, the carrier is bound to higher care and vigilance when the platform is crowded with passengers in proportion as that place is more dangerous than a seat inside the car. And the passenger on his part must exercise proper care under the particular circumstances. A boy may have much intelligence and discretion for one of his age, and still should not be held to the measure of care that ought to be exercised by a man of ordinary judgment.

EXERCISE OF DUE CARE FOR JURY TO DETERMINE.

Where the evidence warrants a finding that the passenger, a boy, rode two miles on the step of a front platform without having been seen by the conductor, the platform full of passengers, the car going at the usual speed of one not overloaded, and the rocking motion so great as to attract the attention of numerous passengers, the case is one for the jury to determine whether the company exercised due care under the circumstances. And this, aside from the testimony of the boy himself, respecting the pushing or jostling against him by the crowd from the time he got on the car until his fall. But his testimony was for consideration of the jury. The learned judge of the Common Pleas committed no error in refusing to charge that "upon the whole evidence in this case the verdict must be for the defendants."

With a single exception we are of opinion that the defendant (plaintiff in error) has no ground to complain of the rulings of the court below; and that exception is the instruction set out in the

third assignment, which must be sustained. After stating that it has been ruled that the absence of gates, or fenders, or screens is a fact to be taken into consideration by the jury in determining the question of negligence on the part of the defendant, the court charged: If, therefore, you are of the opinion that a fender or guard put upon the car, or if upon that car on that day, would have prevented this accident, and that there was no guard or fender there, then you are at liberty to say that the company was careless in omitting to have it. I refer it to the jury to say, as a matter of fact, whether the absence of a guard contributed in any way to the injury of the plaintiff. I refer that fact to you to determine. No guard was there or claimed to have been there. Had one been on the platform, likely it would have prevented the accident. Its absence was a fact to be considered with other facts in the case, in determining what care and vigilance the defendants ought to have exercised. Were the platform so guarded that it would be as safe to ride there as inside, there would be no call for greater care when occupied by passengers. The instruction to the jury was that if they were of opinion that a fender or guard on the platform would have prevented the accident, they are at liberty to say the company was careless in omitting to have it. If the company was careless by reason of that omission, the omission was negligence, and it was the duty of the company to have placed the guard on the platform. The question was the equivalent of saying, as a matter of law, that it was the duty of the company to have the platform guarded by a fender or screen. Unless such was their duty, the jury was not at liberty to say the company was careless by omitting to have the platform guarded. The absence of gates or screens is as patent to the passenger as to the carrier. Neither the street railway companies nor the public have deemed the platforms so unsafe that a man of ordinary prudence would not ride thereon when the car is full inside. The court will not say, as a matter of law, that it is in itself negligence in the carrier not to place a guard on the platform of a horse-car, or in a passenger to stand on the open platform. Germantown Pass. R. Co. *v.* Walling, 97 Pa. St., 55.

Judgment reversed and *venire facias de novo* awarded.

Riding on Platform of Street Car—Contributory Negligence.—See Camden & A. R. Co. *v.* Hoosey, 6 Am. & Eng. R. R. Cas. 454; Fleck *v.* Union R. Co. 16 Ib. 172; Alabama, etc., R. Co. *v.* Hawk, 18 Ib. 194.

South Covington and Cincinnati St. R. Co.

v.

Ware.

(*Advance Case, Kentucky. September* 25, 1886.)

The right of a person to recover damages for a personal injury is not affected by his having contributed to it, unless he was in fault in so doing. One who, through the negligence or fault of another, is put in a position of immediate danger, is not bound to exercise all the prudence and care that ordinarily characterizes the conduct of a prudent man; he has no right, however, upon the happening of some occurrence such as would not create fear or apprehension of injury in the mind of an ordinarily prudent and careful person, to bring injury upon himself and then recover damages by reason of it.

In this case the question was properly submitted to the jury whether, under the circumstances, the party acted rashly and under an undue apprehension of danger.

When a person seeks to recover damages for a personal injury he must aver special damage in order to recover any money expended by him or debt created on account of thein jury.

While the verdict of a jury should not be interfered with upon the ground that it is excessive unless it is flagrantly so, the court holds that a verdict for $4000 in this case is flagrantly excessive and requires a reversal.

The small bone of the plaintiff's leg was fractured at the ankle and some of the ligaments were ruptured. In consequence of this he was laid up not over eight weeks. The fracture has united perfectly and will never trouble him; the ligaments have not healed entirely, but will not trouble him save in going up or down hill or when there is a change of weather, and then he will feel like one with a sprained ankle. No special damage was averred and no circumstances of aggravation shown. *Held*, that a verdict for $4000 is disproportionate to the injury.

Appeal from Kenton Circuit Court.

W. W. Cleary, Jno. C. Benton for appellant.

Hallam v. Myers for appellee.

Holt, J.—The right of a person to recover damages for a personal injury is not affected by his having contributed to it, unless he was in fault in so doing. He may indeed not only contribute to it, but be the immediate cause of it, and yet recover. Thus if a passenger, under a reasonable apprehension that a collision or other accident is imminent, changes his position to one in fact more dangerous, or even leaps from the vehicle while in motion, yet he may recover damages if he be injured; and this is true, even though it may afterward appear that if he had sat still he would not have been injured.

Right of person contributing to injury to recover damages.

One is not bound, under such circumstances, to exercise all the prudence and care that ordinarily characterizes the conduct of a prudent man.

Thompson on Negligence, Vol. II., page 1092, says: "If A, through his negligence or fault, put B in a position of immediate danger, real or apparent, and B, through a sudden impulse of fear, makes a movement to escape the danger, and in doing so accidentally receives another and different injury from that threatened by the negligence of A, he may recover damages of A; for A's negligence or fault is the proximate cause of the injury. Thus a coach suddenly breaks down, going at a moderate gait on a level road. A passenger seated upon the top, becoming alarmed, leaps to the ground and thereby sustains an injury. If he had have remained seated he would not have been injured. The breaking of the coach is the proximate cause of the injury, and if this happened through the negligence of the proprietor he must pay damages; otherwise not. *A fortiori*, if the negligence of B compels A to adopt a particular course, which he would not have adopted but for such negligence, and in so acting with ordinary prudence A is injured, he may recover damages of B."

It is urged that when one is frightened by something resulting from the neglect of the carrier, he cannot be charged with contributory neglect to any extent.

He, however, must act upon a reasonable apprehension of peril. His conduct must conform to that of an ordinarily careful man under like circumstances. He has no right, upon the happening of some trivial occurrence, or such as would not create fear or apprehension of injury in the mind of an ordinarily prudent and careful person, to bring injury upon himself, and then recover damages by reason of it.

PASSENGER MUST ACT UPON REASONABLE APPREHENSION OF PERIL.

This rule is sustained by both reason and precedent.

The Supreme Court of the United States, in the case of Stokes *v.* Saltonstall, 13 Peters 191, said:

"But if the want of proper skill or care of the driver placed the passengers in a state of peril, and they had at that time a reasonable ground for supposing that the stage would upset, or that the driver was incapable of managing his horses, the plaintiff is entitled to recover, although the jury may believe from the position in which the stage was placed by the negligence of the driver, the attempt of the plaintiff or his wife to escape may have increased the peril, or even caused the stage to upset; and although they may also find that the plaintiff and his wife would probably have sustained little or no injury if they had remained in the stage."

Mr. Pierce states the rule thus: "If, through the default of the company or of its servants, the passenger is placed in such a perilous condition as to render it an act of reasonable precaution, for the purpose of self-preservation, to leap from the cars, the company is responsible for the injury he receives thereby, although if he had remained in the cars he would not have been injured."

The same doctrine is announced in the cases of Railroad *v.* Paulk, 24 Geo. 356; Railroad *v.* Morris, 31 Grattan 200; Frink, etc., *v.* Potter, 17 Ill. 406.

The character of the impending danger, or at least its apparent character, is to be considered.

If one acts unreasonably rashly or becomes frightened at a trivial occurrence, which would not alarm a reasonably prudent man, and thereupon brings injury upon himself, then there would be no liability.

Thus if one were to throw himself under the wheels of a stage upon the happening of some circumstance not of a character to alarm a reasonably prudent man, its owner would not be liable. The question must be submitted to the jury whether, under the circumstances, the party acted rashly and under an undue apprehension of danger.

We think this was done in this instance, when the third instruction given at the instance of the appellee and the fourth one of the appellant are considered together. The law of the case would have been more succinctly stated, and less calculated to mislead the jury, if the two instructions had been blended in one; thus if that given for the appellee had embraced the idea that the circumstances must have been such, or apparently such, as to induce a reasonably prudent man to do as the appellee did do, it would have correctly and fully presented the law of the case upon this point.

The first instruction given at the instance of the appellee does not assume, as the counsel for the appellant supposes, negligence upon the part of its agent. It would have done so if the word "negligently," of the use of which he complains, had not been inserted.

The only remaining question is, whether the finding is so excessive as to require a reversal. Its consideration requires a brief statement of the facts of the case.

The appellee was a passenger upon a street car of the appellant, passing over the suspension bridge from Cincinnati to Covington.

The driver upon appellant's cars acts both as such and as conductor. It appears that he can reasonably do so, as he collects the passenger fare while the car is making the ascent to the crown of the bridge, and then resumes his place at the reins and break of his car. The appellee, owing to the car being crowded, was standing upon the rear platform of it, with one foot upon the step. It had passed the crown of the bridge and was descending upon the Covington side. Just behind it was another car of the appellant, which had just turned the crown of the bridge, and as it did so the driver of it was not upon the front platform at the break, with the reins in his hands, but inside of the car, presumably yet engaged in collecting the fare of the passengers. In

FACTS.

consequence of this his horses started down the incline of the bridge, as some of the witnesses say, in a fast walk; but as others testify, in a trot; and the latter are probably correct. The rear car approached so near to the front one, as the burden of the testimony shows, that the tongue was over the tailboard of the platform upon which appellee was standing, and, as he testifies, struck him in the breast. Whether it did strike him or not is quite doubtful from the testimony; but in any event he does not complain of any injury on this account.

Alarmed by the proximity of the rear car, he either stepped or jumped off, and in doing so fractured the fibula or small bone of the leg at the ankle, and ruptured some of the ligaments. In consequence of this he was laid up for not over eight weeks, a physician attending him at least a part of the time. The testimony introduced by himself shows clearly that the fracture has united perfectly and will never trouble him; but that the ligaments have not healed entirely, but will not trouble him save in going up or down hill, or when there is a change of weather, and then he will feel like one with a sprained ankle. This is all of it as shown by the entire testimony. The jury returned a verdict for four thousand dollars.

A long line of decisions has established the rule that the verdict of a jury should not be interfered with upon the ground that it is excessive, unless flagrantly so; and this court has the highest regard for the province of the jury; but is not this verdict open to this objection?

EXCESSIVE DAMAGES—WHEN VERDICT WILL BE INTERFERED WITH.

We doubt if a case can be found where a verdict for so large a sum has been sustained upon such circumstances as appear in this case, and where the injury was as slight.

It is noticeable that the petition does not aver any special damage. It only proceeds for the injury. The appellee could not, therefore, recover any money expended by him, or debt created on account of it. Newman's Plead. and Practice, p. 411.

It is true that upon the trial he was allowed to prove, without objection, that while he was laid up a flood came in the Ohio river, by which he was damaged $3,000; and that he lost business by being confined on account of the injury. These losses were not, however, sued for, and while we cannot reverse the judgment by reason of this testimony, as no objection was made to it, nor by reason of the probable fact that the verdict was based largely upon it, yet we may consider it in arriving at a correct conclusion of the question we are now considering.

The counsel for the appellee say: "The appellant, without objection or exception, or effort to rebut, accepted appellee's own testimony that his financial damage was $3,000, not including his unquestionable medical bill of $500. The verdict of $4,000, there-

fore, gives only $500 for the pain and permanent injury which certainly exists."

The "financial damage" and medical bill were not in question, however; the appellee neither asserted them or attempted it; it was *probata* without *allegata;* he only proceeded for the injury. We must, therefore, assume that the entire sum found was for the injury; and the verdict, of course, does not show otherwise.

It seems to us that it must strike every unprejudiced mind that the one is greatly disproportioned to the other. There were no circumstances of aggravation connected with the injury; it was not the result of wilful or intentional neglect, or such as flows from bad faith of a *quasi* criminal character.

The lasting effect of the injury is at most but slight, not interfering with the power of the appellee to earn a living or transact any business; and upon a careful consideration of all the testimony and circumstances of the case, the verdict can but be regarded as so flagrantly excessive as to demand the interposition of an appellate tribunal.

Judgment reversed, and cause remanded with directions to permit the appellee to plead any proper special damage, if he desires to do so, and for further proceedings in accordance with this opinion.

See next case, and note.

WOOLERY

v.

LOUISVILLE, NEW ALBANY AND CHICAGO R. CO.

(*Advance Case, Indiana. September* 17, 1886.)

A judgment will not be reversed because of an erroneous instruction when it affirmatively appears, from answers to interrogatories, that the instruction complained of was not influential in determining the verdict.

A passenger on a freight train assumes the risks and inconveniences necessarily and reasonable incident thereto; but it is the duty of the railroad company, in such case, to exercise the highest degree of care consistent with the usual and practical operation of such trains, and the same presumptions arise in favor of a passenger injured thereon, while obeying the regulations of the company, as in the case of a passenger on any other train.

An instruction in such case, in substance, that "if the deceased jumped from the car while the train was running at the rate of 14 or 15 miles an hour, he was guilty of such contributory negligence as would defeat a recovery,

unless at the time the circumstances were such as would reasonably have induced a man of ordinary prudence to believe that his life was in danger or that he was in danger of suffering great bodily harm, so that he was impelled to leap from the car in order to escape reasonably apprehended danger," *held* correct.

It is the duty of the court, in every case in which a general verdict is to be rendered, to instruct the jury as to the force and legal effect of the facts provedwithin the issues.

APPEAL from Washington Circuit Court.

Action against railroad company for negligence causing death of a passenger.

Buskirk & Duncan for appellant.

MITCHELL, J.—This was an action by the administrator of Andrew H. Woolery, deceased, against the railway company above named, to recover damages for the benefit of the widow and children of the deceased, for negligently causing the intestate's death. The complaint was in four paragraphs. In each paragraph it is charged that the deceased was a passenger on one of the defendant's freight trains, going from Bloomington to Harrodsburg, in Monroe county. While being so carried it is alleged that the lumber on a flat car immediately preceding the caboose, in which the decedent was seated, became loose, and fell off in confusion, and that the deceased was thrown or jumped from the caboose, and killed. The first paragraph charges negligence against the company, in that the lumber on the flat car was improperly loaded and insecurely stayed. The second charges that the lumber car was improperly loaded, and that the train was run at an immoderate and dangerous rate of speed. The third paragraph charges that the car was unskilfully and negligently loaded, and that the train was recklessly, negligently, and dangerously run. The fourth charges that the car was loaded in a wilfully reckless and dangerous manner, and that the train was run with wilful, reckless and gross negligence. FACTS.

Upon an issue made by the general denial, the case has been twice tried at *nisi prius*, resulting in a verdict each time in favor of the defendant. The evidence in the record tends to show that the deceased was a man in vigorous health, about 48 years old; that he went as a passenger on one of the defendant's freight trains, and for a time occupied a seat provided for passengers, after which he stood by the door at the side of the car, supporting himself by holding to an iron rod which ran horizontally with the top of the door. While in that position, the train running 14 or 15 miles an hour, the stakes and fastenings which held the lumber on a flat car immediately in advance of the caboose gave way, and part of the lumber fell off. Some of it was strewn along the track, and some came against the caboose, making considerable noise, and creating

some confusion. Neither the caboose, nor any of the cars left the track. No injury was done to the caboose, except that some of the lumber in falling broke one of the windows, and one of the door hinges was broken. The passengers seated in the caboose, of whom there were several, sustained no injury. The deceased jumped out of the open door near which he was standing, and was found dead when the train was stopped.

In answer to special interrogatories returned with their general verdict, the jury found that the freight train was run at the rate of speed at which such trains are usually run, but that the lumber car was not loaded and fastened in the ordinary secure way for loading and fastening lumber cars. They also returned that there was not sufficient cause for alarm at the time the deceased jumped from the caboose to cause a prudent man similarly situated to make such a jump. They returned, furthermore, that it was an act of imprudence for the deceased to stand in the doorway of the caboose while the train was running, in the manner described. It thus appears that while the jury found the defendant guilty of negligence in improperly loading the lumber car, their verdict in its behalf was predicated on the fact that the decedent had been guilty of contributory negligence, which resulted in his death.

At the proper time the court instructed the jury as to the facts necessary to be found in order to render the defendant liable under each of the several paragraphs of the complaint. The facts imputing negligence to the defendant, as stated in each paragraph of the complaint, were repeated in substance in separate instructions, and the jury were told that, in order to warrant a finding for the plaintiff under the particular paragraph to which the instruction applied, the facts therein recited must have been substantially proved. It is now urged that these instructions were erroneous, in that they required the plaintiff to prove more than was necessary in each case in order to establish the defendant's negligence. However this may be, since it affirmatively appears from the answers to special interrogatories that the jury found the defendant guilty of negligence, and that their verdict in its favor was the result of finding the decedent guilty of contributory negligence, it is certain that the instruction in reference to this feature of the case was not prejudicial to the plaintiff. "A judgment will not be reversed upon an erroneous instruction, when it affirmatively appears from answers to interrogatories that the instruction complained of was not influential in inducing the verdict. Cleveland, etc., R. Co. *v.* Newell, 104 Ind. 264; s. c., 23 Am. & Eng. R. R. Cas. 492; Barnett *v.* State, 100 Ind. 171.

INSTRUCTION TO JURY NOT GROUND FOR REVERSAL.

In so far as the instructions complained of informed the jury that it was necessary for the plaintiff to prove, by a preponderance of the evidence, that the lumber car was improperly or negligently

loaded, they were not in all respects accurate. If the falling lumber had occasioned the death of the intestate, without his fault, while he was being carried as a passenger, the mere fact that it fell from the car would have raised a presumption of negligence against the defendant, which would have called upon it for explanation. Cleveland, etc., R. Co. *v.* Newell, *supra*, and cases cited. When a person becomes a passenger on a freight train, he assumes the risks and inconvenience necessarily and reasonably incident to being carried by the method which he voluntarily chooses. It is, however, the duty of the railway company, when it undertakes to carry passengers on freight trains, to exercise the highest degree of care for their safety consistent with the usual and practical operation of such trains, and it is responsible for any negligence which results in injury to a passenger while being so carried. The same presumptions arise in favor of a passenger who is injured on a freight train, while passively submitting to the regulations of the company in respect to such trains, as in the case of a passenger on any other train.

PASSENGER ON FREIGHT TRAIN—RISK ASSUMED—DUTY OF COMPANY.

Upon the subject of contributory negligence the court instructed the jury, in substance, that if the deceased jumped from the car while the train was running at the rate of 14 or 15 miles an hour, he was guilty of such contributory negligence as would defeat a recovery, unless at the time the circumstances were such as reasonably to have induced a man of ordinary prudence to believe that his life was in danger, or that he was in danger of suffering great bodily harm, so that he was impelled to leap from the car in order to escape reasonably apprehended danger. It is said, in criticism of the instructions on that subject, that the question of contributory negligence was a question of fact to be determined by the jury. It was the exclusive province of the jury to ascertain the facts, and apply them when ascertained to the law, and return their general verdict accordingly. In doing this, however, they were to be guided by proper instructions from the court as to the law of the case. In that connection it was the duty of the court to instruct the jury what facts within the issues in the case, if established by the proof, would or might, under the circumstances, constitute contributory negligence, leaving the duty of discovering to the jury whether such facts and circumstances were proved or not. Simply to have told the jury that the plaintiff must have been free from contributory negligence, without stating what facts might constitute contributory negligence, would have been to leave the jury without any direction whatever in respect to the legal effect of the facts in the case. The practical result of the doctrine contended for would be to submit both the law and the facts to the determination of the jury. It cannot be maintained that a civil case can arise in

CONTRIBUTORY NEGLIGENCE IN JUMPING FROM THE CAR.

which the court is incompetent to declare the law upon the facts, when the facts are either admitted or satisfactorily proved. Where the essential facts are ascertained in any case, the litigants have a right to call upon the court to declare the law. Wannamaker *v.* Burke, 111 Pa. St. 423.

If the court can do nothing more than deal in abstract generalities in its charge, then in every case involving negligence the jury are left at sea—a law unto themselves. It is the duty of the court, in every case in which a general verdict is to be returned, to instruct the jury as to the force and legal effect of the facts which may have been proved within the issues. Conner *v.* Citizens', etc., R. Co., 105 Ind. 62, and cases cited; Pittsburgh, etc., Co. *v.* Spencer, 98 Ind. 186; Pennsylvania Co. *v.* Marion, 104 Ind. 239; Binford *v.* Johnson, 82 Ind. 426; Drinkout *v.* Eagle Mach. Co., 90 Ind. 423; Bruker *v.* Town of Covington, 69 Ind. 33; Zimmerman *v.* Hannibal, etc., R. Co. 71 Mo. 476; s. c. 2 Am. & Eng. R. R. Cas. 191; Railroad Co. *v.* Depew, 40 Ohio St. 121.

It may be true that a particular act cannot always be designated as negligent or otherwise until the surrounding circumstances which may have governed and controlled the actor are satisfactorily established. When, however, the act, and all the surrounding facts and circumstances, are beyond dispute, the court must declare the law one way or the other, upon the facts. Railway Co. *v.* Goddard, 25 Ind. 185, 192. If the plaintiff's intestate, induced by groundless fear, leaped from the car when there was no reasonable cause to apprehend danger to life or limb, then, even though the railroad company was guilty of negligence in loading the lumber car, its negligence did not proximately cause the intestate's death, and no recovery could have been had. Railroads are not responsible for the rashness or folly of passengers. Jeffersonville R. Co. *v.* Swift, 26 Ind. 459–476; Railroad Co. *v.* Aspell, 23 Pa. St. 147.

When, by the negligence or misconduct of one, another is suddenly put in peril, if the person so imperilled, while under the impulse of an apparently well-grounded fear, seeks to escape, and suffers injury from another source, the author of the original peril is answerable for all the consequences which ensued, provided that in attempting to make his escape the injured person exhibited such conduct as might reasonably have been expected from an ordinarily prudent person under similar circumstances. The inquiry in such a case always is, did the negligence of the defendant put the injured person to the choice of adopting the alternative of an attempt to escape, or to remain under an apparently well-grounded apprehension of serious personal injury? Did he act with ordinary prudence, considering all the circumstances which surrounded him, or was his injury the result of a rash apprehension of danger which did not exist? If a man, wrongfully menaced with a switch, should purposely leap over a dangerous precipice in order to escape

a possible stroke, it would hardly be claimed that he could recover for an injury caused by the leap. So, if the intestate voluntarily leaped from a train while it was moving at a rate of speed which made death or great bodily harm inevitable, he was guilty of negligence arising to the degree of rashness, unless the falling lumber produced such a condition of things as reasonably to have induced in his mind the belief that to remain would result in great bodily harm. Jones *v.* Boyce, 1 Starkie 493; Stokes *v.* Saltonstall, 13 Pet. 181; Card *v.* Ellsworth, 65 Me. 547; Sears *v.* Dennis, 105 Mass. 310; Wilson *v.* Northern Pac. R. Co., 26 Minn. 278; Buel *v.* New York Cent. R. Co., 31 N. Y. 314; Pittsburgh *v.* Grier, 22 Pa. St. 54; Indianapolis, etc., R. Co. *v.* Stout, 53 Ind. 143.

The instructions relating to the subject of contributory negligence were in consonance with the principles above stated. They were therefore not erroneous.

What has been said disposes of all the questions made upon the subject of instructions; those relating to the amount of proof required to establish the defendant's negligence being, as we have before seen, disposed of by the finding of the jury of such facts as affirmatively show that the defendant was negligent.

Some question is made in respect to rulings of the court in excluding evidence offered by the plaintiff below. The evidence the exclusion of which is complained of was not admissible; but whether it was or not, the manner in which the question is sought to be presented is directly within the ruling in Higham *v.* Vanosdol, 101 Ind. 160, and Judy *v.* Citizen, Id. 18, and is therefore not presented in such manner as to require further consideration.

The judgment is affirmed, with costs.

Injury to Passengers Riding on Freight Train.—See next case and note. **Attempt of Passenger to Avoid Danger by Jumping from Car not Contributory Negligence.**—Where a passenger is placed by the negligence of a carrier in a situation of peril, his attempt to escape the danger, even by doing an act also dangerous, and from which injury results, is not contributory negligence such as will prevent him from recovering for the injury sustained, if the attempt was one which a person acting with ordinary prudence might under the same circumstances make. This is to be determined from the circumstances *as they appear to the passenger at the time*. The facts that his attempt to escape resulted in injury to him, and that, if he had not made the attempt he would not have been injured, do not necessarily prove the act an imprudent one. Wilson *v.* Northern Pacific R. Co., 26 Minn. 278; Smith *v.* St. Paul, etc., R. Co., 30 Minn. 169; Stokes *v.* Saltonstall, 13 Peters, 180; Twomley *v.* The Central Park, etc., R. Co., 69 N. Y. 158. In this case it was also *held* that evidence that the other passengers jumped off was competent to prove the prudence of such jumping. See also Southwestern R. R. Co. *v.* Paulk, 24 Ga. 356; Schultz *v.* The Chicago, etc., R. Co., 44 Wis. 638. Where there are two or more lines of action, any one of which may be taken, and a person, with ordinary skill, in the presence of imminent danger is compelled to take one of them, and does so in good faith, the mere fact that it is afterwards ascertained by the

result that his choice was not the best means of escape, it is not sufficient to show contributory negligence. Gumz *v.* Chicago, etc., R. Co., 52 Wis. 672. See also Iron R. Co. *v.* Mowery, 3 Am. & Eng. R. R. Cas. 361; Nashville, etc., R. Co. *v.* Erwin, 3 Ib. 465; Smith *v.* St. Paul, etc., R. Co., 9 Ib. 262; Pittsburgh, etc., R. Co. *v.* Rohrman, 12 Ib. 176.

HARRIS

v.

HANNIBAL AND ST. JOSEPH R. CO.

(*Advance Case, Missouri. June* 21, 1886.)

The plaintiff was a passenger on a freight train on the defendant road. Before the train reached the depot at the place of his destination, it stopped to do some switching. The plaintiff got up from his seat to see if he was to get off there. While walking to the door of the car a coupling was made, causing a violent jar, which threw plaintiff to the floor and injured him. In an action to recover damages for the injuries sustained, it was *held*, that the plaintiff was guilty of contributory negligence and could not recover; that the dangers naturally incident to travel by rail are greater on freight than on passenger trains, and call for a correspondingly higher degree of care on the part of passengers.

APPEAL from Marion Circuit Court.

Action to recover damages for personal injuries sustained by plaintiff while riding in the caboose of defendant's freight train. Defence, contributory negligence. Verdict and judgment for plaintiff, and appeal therefrom by defendant.

W. M. Boulware for respondent, Jacob Harris.

G. W. Easley for appellant, Hannibal & St. J. R. Co.

NORTON, J.—This is an action to recover damages for injuries to plaintiff while a passenger on one of defendant's trains, and alleged to have been occasioned by the carelessness and negligence of defendant's servants in managing the train, whereby he was thrown down on the floor of the car, and seriously injured. The answer was a general denial, and also set up contributory negligence on part of plaintiff. The case is before us on defendant's appeal from the judgment rendered for plaintiff. At the close of plaintiff's evidence defendant asked an instruction by way of demurrer to it, which the court overruled, and this action of the court is assigned as one of the grounds of error.

The only witness on behalf of plaintiff, as to the circumstances under which the injury complained of was inflicted, was the plain-
FACTS. tiff himself, who testified, in substance, that he took passage in a caboose attached to one of defendant's freight trains,

to be carried from Palmyra to West Quincy; that the train, before reaching the depot at West Quincy, stopped about a quarter of a mile therefrom; that ten or fifteen minutes after it stopped he got up to see if he was to get off there, it occurring to him that he had seen a notice that passengers would be expected to alight when the train stopped; that he knew the train was not at the depot; that the train generally went further east towards the depot than it did on this occasion before it stopped; never had known it to stop so far away to let passengers off; supposed they were going down to the depot, till they remained there longer than usual; that while he was walking to the door of the car a coupling was made, causing a more violent concussion or jar than he ever before experienced, though he had been in the habit of riding on trains for many years, which threw him down on the floor of the car, inflicting the injury for which he sued; that he may have heard the cars moving; that he was thinking of business, and did not notice particularly; that he supposed he could have heard the cars while he was seated, and that he did probably hear them, but did not remember; that when he got up from his seat some person was sitting in a chair, and that on getting up after the concussion or jar which threw him down, he saw the chair on top of the person who occupied it.

As the demurrer to the evidence admits not only the truth of the facts disclosed by it, but also every inference in favor of the plaintiff which could be reasonably deduced from them, we are of opinion that the court did not err in overruling the demurrer.

The trainmen and several others, who were passengers in the caboose when the cars were coupled, were introduced as witnesses on behalf of defendant; all of whom testified that the coupling was made in the usual manner, and that there was no jolt or jar more than was usually incident to the coupling of freight cars, flatly contradicting plaintiff in these particulars. In view of this state of facts, and that discomforts and dangers are more incident to travel on freight than on passenger trains, and hence calling for a higher degree of care on the part of the passenger, the eleventh instruction asked by defendant, and refused by the court, ought to have been given; the giving of which is fully warranted by the cases of Henze *v.* St. Louis, K. C. & N. R. Co., 71 Mo. 636, and Powell *v.* Missouri Pac. R. Co., 76 Mo. 80.

RISK RUN AND CARE REQUIRED ON FREIGHT TRAINS.

The instruction is as follows: "(11) If the jury believe from the evidence that plaintiff knew, or by the exercise of ordinary care could have known, that the train had stopped to do some switching; and by the exercise of ordinary care could have known that a part of the train was likely to be backed against the part to which the caboose was attached, and that some concussion or jar would likely be produced in the caboose, and that the plaintiff

then, without thinking about the approach of the cars, and without paying any attention to whether the cars were approaching or not, left his seat and stood up in the car, and was thrown down and injured when he would not have been had he kept his seat, or resumed the same before the cars struck—then the plaintiff was guilty of such contributory negligence as bars his recovery, and the jury must find for defendant.

For the refusal to give this instruction the judgment is reversed and cause remanded.

(All concur.)

Passengers on Freight Trains.—See International & G. N. R. Co. v. Irvine, 23 Am. & Eng. R. R. Cas. 518; Perkins v. Chicago, etc., R. Co., 21 Ib. 242, and note; Burlington, etc., R. Co. v. Rose, 1 Ib. 253, and note.

HIGGINS

v.

CHEROKEE RAILROAD.

(73 *Georgia*, 149.)

Grounds of motion for new trial, which complain that the court did not charge certain propositions of law, which he should have given in charge, but which do not show that his attention was especially called to these questions, or that a fuller or more particular charge on them than was given was requested, present no issue upon which this court can pass; and such grounds and a bill of exceptions predicated thereon fail to point out in what the alleged errors consist.

A bill of exceptions must plainly specify not only the decision complained of, but the error alleged to exist therein, and without a compliance with this requirement, this court cannot consider the points made under such general exceptions.

In an action against a railroad company for an injury to the plaintiff's eye, caused by a spark or cinder from the defendant's engine, there was no error in refusing to permit the plaintiff to prove that the defendant was worth from two to three hundred thousand dollars.

On the question of the negligence imputed to the defendant, the testimony of a witness familiar with the management, use and construction of steam locomotive engines, "that he never heard of any accident to persons from sparks emitted from the smoke-stack, either before or since," the one then under investigation was pertinent and material.

If counsel for one party discussed in argument questions outside of the issues made in the case, without objection being made thereto, and when his adversary, in reply, sought to do so likewise, he was interrupted, and was requested by the court to confine himself to the case, this furnished no ground of exception.

There is no rule or practice which prohibits the discussion of a motion for nonsuit in the presence of the jury empanelled to try the case. The practice

of removing the jury in certain cases, when questions of the admissibility of evidence are to be discussed, rests on peculiar reasons not applicable to a motion for nonsuit; and this practice will not be extended to other cases than those in which it has already been permitted.

At best, this is a matter of discretion for the court, and his discretion will not be controlled, unless in a case of flagrant abuse.

Evidence that there was a point on the defendant's road over which the train on which the plaintiff was riding passed, where there was a grade of two hundred and ninety feet to the mile, and that, in ascending it, the engine emitted steam and cinders in greater quantities, and with much more force, than when passing over other portions of the road, was inadmissible, where it was not pertinent to any issue made by the pleadings; and especially so where there was no allegation or offer to prove that it was a scale or cinder emitted in this locality which struck the plaintiff in the eye and occasioned the injury for which this suit was brought.

Where an amendment was made, raising an issue on which such evidence would have been admissible, but was subsequently withdrawn, this did not render the evidence admissible.

The plaintiff was voluntarily on the train where he was injured, by the invitation of the conductor, made at his own request; he paid no fare, and none was expected from him; he selected an open flat car, on which he rode rather than in the passenger coach, and was in a position where he was more exposed to accident from sparks and cinders than he would have been had he taken a seat in the closed coach. *Held*,

That he was entitled to look only for such security as that mode of conveyance was reasonably expected to afford; and having voluntarily incurred the injury of which he complains, resulting from getting a cinder in his eye, he was not entitled to recover from the railroad, even if it were somewhat at fault.

It is doubtful if, under the circumstances, he was a passenger at all in the full legal sense of that term. At most, he was so only *sub modo* and to a limited extent.

A carrier of passengers is not obliged to foresee and provide against casualties which have not been known to occur before, and which may not be reasonably expected. If it has availed itself of the best known and most extensively used safeguards against danger, it has done all the law requires, and its liability is not to be ascertained by what appears for the first time after the disaster to be a proper precaution against its recurrence.

Before Judge BRANHAM. Polk Superior Court.

Thomas Y. Higgins brought his action against the Cherokee R. Co. to recover $10,000, as damages for a personal injury, alleged to have resulted to him from the negligence of the defendant.

On the trial, plaintiff testified, in brief, as follows: On Sunday, May 2, 1880, plaintiff was at Rockmart on a visit. Defendant's train came up. A Mr. Bullock, who was on board, and whom plaintiff had not seen for some time, hallooed to him to get on and go to Cedartown with them. Plaintiff boarded the train, and the car which he was on being crowded, he and others went forward to the next car. This was immediately in the rear of the tender of the engine. It was a flat car, without sides or covering, and with benches across it. Plaintiff was near the rear of this car. A thin spark or scale of iron from the engine stuck in his right eye. At the time it did not hurt him very much, but when he arrived at

Cedartown, it was paining him considerably. The pain became very severe, so that plaintiff was in bed for three or four months; he suffered great pain, and ultimately lost the sight of that eye entirely, and the sight of the other eye was also much impaired. He called in a physician that night or the next day, and subsequently went to Atlanta, where he was treated by other doctors. He paid $25.00 to one physician, and owed $50.00 to another for a single operation, besides other bills. His expenses and loss of time while sick would amount to $400.00 or $500.00. Prior to the injury he had been engaged in different occupations, as carpenter, whiskey-seller, seller of beef and buyer of cotton. When he worked out, he never did so for less than $50.00 per month. He had a family, consisting of himself, his wife, and two children. Since the injury he cannot work after night, and is unfitted by his defective vision for the pursuits which he formerly followed. Several years prior to the injury plaintiff had worked as a train hand on the road. The cars then ran from Cartersville to Rockmart, and the train then ran on Sundays. On the day of the injury there were four or five flat cars composing the train, but no passenger car; all appeared to be full. He did not see any convicts on the train, nor did he see any ladies. He did not pay any fare, because none was asked of him; would have paid it if asked. He denied having any conversation with one Vandiver about riding on the train. Had heard of persons having their eyes hurt by riding on trains, but not from riding near the engine. The engine had no spark-arrester; it may have had one on that day, but not since; he has examined it since, and it has none. He saw nothing unusual about the running of the train that day. The engine was the newest one they had on the road. In February, 1880, plaintiff had ridden on the same train, but then rode in the cab; thought it was the same engine. He denied intemperate habits, but said he "took a dram." At the time of the injury plaintiff was thirty-four years of age.

Plaintiff closed. Defendant moved for a nonsuit, on the ground that the injury was not attributable to any negligence on the part of the defendant; that it was not such an accident as the company could foresee and provide against; and that the damage was too remote. The motion was overruled.

Later in the trial plaintiff introduced other evidence, to the effect that his expectation of life was about thirty-one years; that from childhood he had had some inflammation in the lids of his eyes, but his sight was good; that he complained and seemed to be in considerable pain. One witness testified that he extracted a cinder from plaintiff's eye which was stuck in the back, and that the cars were full of persons when the accident occurred. A witness for the plaintiff testified that there was an excursion on the day of the accident. There was also other evidence confirmatory of that already detailed.

The evidence for the defendant was, in brief, as follows: It was not usual to run trains on Sunday on defendant's road. On this occasion certain convicts, under the control of Col. C. B. Howard, were to be carried to work on a cut or grade on the road. They were expected in Cartersville on Saturday, but failed to arrive, and were carried over defendant's road on Sunday. There was no excursion. There was a passenger coach attached, and about twenty paying passengers, besides four non-paying ones, including the plaintiff, were on board. The convicts were not allowed to ride in this coach, but were carried on the flat cars. The conductor testified that he usually carried about twenty along the line, and that he had carried eighty passengers at one time, but that that was a full double load, every seat and the aisles being full. The engine used at the time of the accident to plaintiff was a new one, having been in use only a few months. It was a wood-burner of good make, and had a spark-arrester, such as is usual. Near the mouth of the smoke-stack there was a hood, or iron piece shaped somewhat like an umbrella, against which the steam from the exhaust pipes, carrying with it the smoke and cinders, struck. This had a tendency to throw to the bottom all heavy particles, and subsequently they would be cleaned out of the smoke-stack. Above this was a wire net, having apertures one eighth of an inch in size, so that nothing larger than this could escape. Some sparks and cinders escape from all engines; this cannot be helped. Cotton had frequently been hauled directly behind the engine without accident from sparks. The president and conductor of the defendant testified that they never heard of any serious personal injury from engine sparks before. Plaintiff and Vandiver, the conductor of defendant, had worked together on the road. On the evening before the accident, plaintiff told Vandiver that he would like for the latter to get him a job, and Vandiver said he would do anything he could. On the evening of the accident, plaintiff asked Vandiver to let him go up to Cedartown, that he might see Mr. West, the president of the road. Vandiver assented, and carried plaintiff free of charge, as is generally done among railroad men. He invited plaintiff into the passenger car at the rear of the train where there was room, but plaintiff said he had not been over the road since it was built, and wanted to see the country; that he would go out on the flat car and ride there. Vandiver told him "all right;" that he would go back in the passenger car, and would join him as soon as he had finished. About two and a half miles from Wimberley's hill, the conductor noticed plaintiff wiping his eye, and the latter said that he had a cinder in it. On the day previous, however, the conductor had noticed plaintiff wiping his eyes with a silk handkerchief, and that they were very red and running; plaintiff said they were sore. On arriving at Cedartown, Vandiver introduced the plaintiff to West, but the latter said he

did not have time to talk to him, and plaintiff returned to Rockmart that evening. The train was run in the usual manner on that day. After the accident, plaintiff remained about Rockmart for some days, and was drinking whiskey; it was his habit to drink some. There is more likelihood of getting cinders in one's eyes and getting one's clothing burned on a flat car than in a coach. It is not customary to haul passengers on flat cars, but in coaches.

The jury found for the defendant. Plaintiff moved for a new trial on the following grounds:

(1.) Because the verdict is contrary to the evidence, against the weight of the evidence, and is without evidence to support it.

(2.) Because said verdict is contrary to law, and to the principles of practice and equity.

(3.) Because counsel for the defendant, in the argument of the case before the jury, were allowed to discuss the importance and beneficial effects of railroads upon the country; and when counsel for the plaintiff, in the commencement of his argument, began to allude to the great power and influence of railroad corporations, and stated that "the contest between the plaintiff and the defendant was an unequal one," the court said, "Confine yourself to the case; I cannot permit you to discuss the parties."

(4.) Because the court refused to allow the plaintiff to prove by the witness, Charles West, that the defendant was worth the sum of two to three hundred thousand dollars. The witness so stated in answer to plaintiff's question, and, on motion of defendant's counsel, the court ruled out the testimony as irrelevant.

(5.) Because the counsel for defendant, after the plaintiff had closed his case, made a motion for a nonsuit, and the court permitted the argument on said motion for a nonsuit to be had in the presence and hearing of the jury. [Note by the court: "There was no request or suggestion by any one that the jury should be sent from the court-room. The motion, of course, was refused."]

(6.) Because the court did not state to the jury the issues and charges, as contained in the declaration, and, though requested to do so by plaintiff's counsel, failed to do so. [Note by the court: "Reference is made to the charge hereto attached, as to what was said and done in reference to this ground; nothing, except what is stated in the charge on this subject, was said or done, and there was no suggestion that the direction to the jury to look to the declaration for this purpose was insufficient.]

(7.) Because the court stated to the jury that "the defendant pleads the general issue, which is a denial of the plaintiff's cause of action, and says that there was a passenger coach on the train into which the plaintiff might have gone; that he rode on the open car, on his own voluntary motion, to see the country; that the smoke-stack was provided with the most approved and best spark-

arrester; that the engine was a new one, and of the best manufacture, not worn and rusted; and that the injury was occasioned by the plaintiff's own want of ordinary care or the result of pure accident,"—when, in fact, the only pleas were the general issue, and a second plea, stating generally that the injury was caused by plaintiff's own fault or negligence.

(8.) Because the court stated to the jury, "the plaintiff alleges that the defendant was negligent in providing an open platform car, upon which he was riding, so near the engine; and that the smoke-stack of the engine had no spark-catcher or screen over the top of it, in consequence of all of which a large cinder or firebrand, some three-eighths of an inch in length, escaped out of the top of the smoke-stack, and injured and destroyed his right eye, and that he is in danger of losing the use of his other eye by reason of its sympathy with the injured eye. By amendment to the declaration, the plaintiff says that the smoke-stack had become so worn and rusted by use and exposure that the exhausting and escaping of the steam through it separated from it a particle of rusted iron and threw it into his right eye with great force, and that this was the cause of the injury."—Plaintiff's counsel stated to the court that the declaration was broader and contained other allegations; whereupon, the court said to the jury, "You will look to the declaration, and see whether I have stated it or not. I think I have stated the issue substantially."

(9.) Because the court did not charge the jury that the defendant was responsible to the plaintiff as a passenger, the defendant's counsel having, in their arguments to the jury, insisted that he was riding free, and as the invited guest of the conductor, and that he was, therefore a trespasser, and that the relation of carrier and passenger did not exist.

(10.) Because the court charged the jury, "If a number of colored persons were occupying and riding on open flat cars, and the defendant had provided a suitable and safe passenger car for other passengers, and had it attached to the train at the time, and it was sufficient for the accommodation of such other passengers, then if the plaintiff obtained the consent of the conductor of the train to ride on the open flat car, for his own special accommodation, then he is only entitled to expect such security as the mode of conveyance, so far as the open flat car was concerned, might reasonably be expected to afford, and if he did so obtain such consent and did, under such circumstances, ride on a flat car, and was only exposed to such risk as resulted alone from riding on such flat car, and if the smoke-stack was not defective, and if it was provided with the best known spark-arrester in actual use, and the plaintiff's eye was, under such circumstances, injured or destroyed by a spark, cinder or scale from the smoke-stack, he would not be entitled to recover."

(11.) Because the court charged the jury, "If the plaintiff's eye was injured or destroyed from some cause other than a spark or cinder or scale from the smoke-stack, then he cannot recover."

(12.) Because the court charged the jury, "If the injury was the result of the plaintiff's own negligence, he cannot recover; or if it was a pure accident, he cannot recover."

(13.) Because the court charged the jury, "If the injury be small or the mitigating circumstances be strong, nominal damages only are given."

(14.) Because the court refused to allow the plaintiff to prove by the witness, Charles West, that the defendant's railroad had, at a place on its line between Rockmart and Cedartown, to wit: at Wimberley's hill, a grade of two hundred and ninety feet to the mile, and that in ascending such a grade the engine emitted steam and cinders in greater quantity and with unusual force.—The witness had so testified in answer to plaintiff's cross-examination, and the court, on motion of defendant's counsel, ruled out the evidence, on the ground that there was no allegation in the declaration to authorize such proof. [By the court: "When counsel for plaintiff proposed to introduce this evidence, counsel for defendant objected, upon the grounds that there was no corresponding allegation in the declaration, and no claim that sparks were emitted from the smoke-stack on account of any defect in the construction of the road, or because of an extraordinarily steep grade. The court then said there should be such an allegation in the declaration; the plaintiff's counsel then amended the writ by inserting such an allegation; the defendant's counsel having moved for a continuance on account of the amendment, the plaintiff's counsel withdrew the amendment, and the trial proceeded without further reference to this question."]

(15.) Because the court did not charge the jury that the plaintiff would have the right to be compensated in damages for his physical and mental pain and sufferings, but in the charge stated, as some of the elements of damages, "the actual value of lost time, medical bills paid and actually owing the physician, the actual loss on account of diminished capacity to labor."

[The court added the following note: "I will state that the failure of the court to charge specially on the subject of mental and physical pain, as one of the elements of damage referred to in the 15th ground of this motion, was an accidental, and not an intentional omission."]

(16.) Because the court did not give the jury any rule for determining the weight of evidence, or the preponderance of evidence.

(17.) Because the court did not give the jury any rule for reconciling the testimony of witnesses, nor for determining the credibility of witnesses in cases of conflict in their statements, although the testimony in the case was painfully conflicting.

(18.) Because the whole charge of the court did not fully and fairly present to the jury the case made by the pleadings and evidence presented by the plaintiff.

(19.) Because the court allowed the witness, A. G. West, to testify as follows: "I never heard of any accident to persons from sparks from the smoke-stack of this engine before nor since."—The plaintiff objected to the introduction of the evidence, on the ground that it was not relevant to the issue, which objection the court overruled and admitted the evidence.

The motion was overruled, and plaintiff excepted.

J. A. Blance; Dabney & Fouche, for plaintiff in error.

Ivy F. Thompson, E. N. Broyles, Underwood & Rowell for defendant.

HALL, J.—1. The 6th, 9th, 15th, 16th and 17th grounds of the motion for a new trial complain that the judge omitted charges upon certain questions involved in this litigation, and which were claimed to be essential to its full consideration. It is not shown, however, that his attention was specially called to these questions, or that a fuller or more particular charge on them than that given was requested. Counsel seem to forget that they owe a duty to the court in this respect, and if they fail to perform it, they thereby, as a general rule, estop themselves from excepting on such grounds. Exception is taken to what the court did not charge or decide, rather than to its charges and rulings, and both the motion for a new trial and the bill of exceptions utterly fail to point out in what the error consists. No issue is made by such exception upon which we can pass, as has been repeatedly held. Indeed, the practice in this respect is so well settled that we need do nothing more than mention the rule to secure the ready acquiescence of the profession, not only to its existence but its propriety.

OMISSION TO CHARGE ON POINTS NOT REQUESTED NO GROUND FOR NEW TRIAL.

2. Various rulings and charges of the court are set forth in the 7th, 8th, 10th, 11th, 12th, 13th and 18th grounds of the motion, and excepted to generally as erroneous, without specifying in what the error consists. Such general exceptions are insufficient. The bill of exceptions must plainly specify not only the decision complained of, but "the error alleged" to exist "therein," and without a compliance with this requirement, we cannot consider the points, which, for aught that appears from the record, are presented for the first time in this court. No argument should be allowed here upon questions thus presented.

3. There was no error in refusing to permit the plaintiff to prove that the defendant was worth the sum of from two to three hundred thousand dollars, as set forth in the 4th ground of the motion. We are unable to presume the relevancy of such testimony to any issue made in the case; it

WEALTH OF DEFENDANT IRRELEVANT.

had no tendency to illustrate any contested question, and for that reason was incompetent.

EXPERT TESTIMONY CONCERNING INJURY FROM SPARKS.

4. On one of the leading questions in the case, the negligence imputed to the defendant, testimony of a witness familiar with the management, use and construction of steam locomotive engines "that he never heard of any accident to persons from sparks emitted from the smoke-stack, either before or since" the one then under investigation was pertinent and material, as will be shown further on, and the court was right in admitting it. There is, therefore, nothing in the exception set out in the 19th ground of the motion.

INTERRUPTION OF COUNSEL'S REMARKS.

5. The third ground of the motion complains that the defendant's counsel, in his argument to the jury, discussed questions outside the issues made in the case, and that when plaintiff's counsel (who does not seem to have offered any objection to his opponent's course) attempted to reply by following in the same track, he was interrupted and requested by the court to confine himself to the case, with the further remark, "I cannot permit you to discuss the parties." The evidence in every case is confined to the issue, and the discussion should not go out of that. Had the court's attention been called to the transgression of this rule by the defendant's counsel, we entertain no doubt that a proper reproof would have been administered, and that he would have been recalled from his wanderings, and compelled to confine his remarks to the case. Plaintiff's counsel, as it seems, did not wish to interpose; he was willing to indulge his adversary, thinking, doubtless, that he would be able to make capital for his client by his reply. The judge's attention was called to the matter at this point, and he very properly interfered to check remarks which tended to divert the attention of the jury from the case and to induce them to reach a conclusion from considerations foreign to those arising from the facts in proof.

DISCUSSION OF MOTION FOR NONSUIT IN PRESENCE OF JURY.

6. We are not aware of any rule or practice that prohibits the discussion of a motion for a nonsuit in the presence of the jury empanelled in the case. They are sometimes removed, upon the suggestion of either party, or by the court itself, when questions of the admissibility of evidence are to be discussed; this practice stands upon peculiar reasons, not at all applicable to the discussion of a motion for nonsuit. If the motion is granted, the case is withdrawn from the jury, but if it is denied, the impression which would be generally made upon their minds would not be unfavorable to the plaintiff. We are unwilling to extend this practice to other cases than the one in which it has already been permitted. It is, at best, a matter much in the discretion of the court, and without a flagrant abuse of it, we would not feel justified in interfering with its exercise. It follows that the exception to the ruling complained of in the 5th ground of the motion is not well taken.

7. The plaintiff proposed to prove that there was a point on defendant's road over which the train passed on which he was riding where there was a grade of two hundred and ninety feet to the mile, and that in ascending it the engine emitted steam and cinders in greater quantities and with much more force than when passing other portions of the road. This evidence was objected to and ruled out, because the declaration did not allege that the defendant had been negligent in constructing this part of its road. The plaintiff then amended his declaration so as to let in the evidence, when the defendant claimed surprise, and asked that the case be continued; that the continuance be charged to the plaintiff. Therefore the amendment was withdrawn and the case proceeded, the plaintiff insisting that the testimony offered was admissible without it. But the court below was not of that opinion, and we agree with him. It was not pertinent to any issue made by the pleadings as they stood, without the amendment; and especially is this true, as there there was no allegation or offer to prove that it was a scale or cinder emitted in this locality that struck the plaintiff's eye and occasioned the injury for which the suit was brought. This disposes of the 14th ground of the motion, and with it of all the special grounds set forth therein.

EVIDENCE OF EMISSION OF CINDERS ON STEEP GRADE—AMENDMENT TO DECLARATION.

8. While we are strongly inclined to the opinion that the plaintiff's evidence made no case entitling him, under the law, to a verdict, and that the motion for a nonsuit should have been sustained, under the rule laid down in Zettler *v.* The City of Atlanta, 66 Ga. 195, 196, that it "should always be awarded where the judge would set aside a verdict, if found for the plaintiff, for the want of sufficient evidence to support the same." Yet, inasmuch as no cross-bill of exceptions was taken, or other exception made to the decision overruling the motion, we will not decide the question in this case, as well as another made in connection with it, viz., to what extent negligence is a question, both as to the law and fact involved in it, peculiarly cognizable by the jury, and as to the power of the judge to charge them as to facts which constitute negligence, or which relieve the party accused from the charge. This much-mooted question is necessarily involved in the final disposition of this case, and need not not be further considered.

EXTENT TO WHICH NEGLIGENCE IS QUESTION FOR JURY.

9. But, be this as it may, we are satisfied that the jury have reached a correct conclusion, and had they found differently their verdict would have had no foundation to rest on.

The plaintiff was voluntarily on this train by the invitation of the conductor, extended at his own request; he paid no fare, and none was expected from him; he selected the car on which he rode; it was his own choice that he was upon an open flat car, rather than in the passenger coach—that he was

PASSENGER RIDING IN PERILOUS PLACE.

in a position where he was more exposed to accident from sparks and cinders than he would have been had he taken a set in a closed coach; he rode there for his own special accommodation, and was entitled to look for only such security as that mode of conveyance was reasonably expected to afford. He voluntarily incurred the injury of which he complains, and even if the other party were somewhat at fault, he could not recover damages against it therefor. 19 Ga. R. 445, 446. By the exercise of ordinary care he could have avoided the consequence to himself, and is therefore entitled to no recompense, even if the defendant was negligent. Code, § 2972, and citations. This would be true, even if he were regarded as a passenger, entitled to all the rights growing out of that relation. It is doubtful if he was, under the circumstances, a passenger at all in the full legal sense of that term; at most he was so only *sub modo*, and to a limited extent. The defendant's engine, according to the weight of evidence, was properly constructed and provided with the best known "spark-arrester;" it was in proper order, and if the defendant was injured under the circumstances, the injury is attributable to accident rather than negligence. 2 Thompson Neg., p. 1234 (7), and citations. A carrier of passengers is not obliged to foresee and provide against casualties which have not been known to occur before, and which may not be reasonably expected. If he has availed himself of the best known and most extensively used safeguards against danger, he has done all that the law requires, and his liability is not to be ascertained by what appears, for the first time after the disaster, to be a proper precaution against its recurrence. Cooley on Torts, note 2, beginning on page 671 and extending on page 672 (the latter portion of note and citations therein), especially 56 N. Y. R. 1; Id, 656; 18 Id. 408; 68 Id. 306, 310, and citations; 84 Id. 455; 50 Cal. 183; 70 Penn. p. 86; Wood's Mayne Dam. p. 69; 1 Sutherland Dam. 21, 22, 23. If these cases announce correct principles of law, as we think they do, then is the action of the court, in refusing to disturb this verdict, fully vindicated.

WHETHER PLAINTIFF WAS PASSENGER.

Judgment affirmed.

Liability for Injuries to Passengers Riding in Perilous Place.—See Penna. R. Co. *v.* Langdon, 1 Am. & Eng. R. R. Cas. 87; Kentucky, etc., R. Co. *v.* Thomas, 1 Ib. 79; Nashville, etc., R. Co. *v.* Erwin, 3 Ib. 465; Houston & T. C. R. Co. *v.* Clemmons, 8 Ib. 396; Little Rock, etc., R. Co. *v.* Miles, 13 Ib. 10; Rucker *v.* Missouri Pac. R. Co., and note, 21 Ib. 245–248.

Felton, Admr.

v.

Chicago, Rock Island and Pacific R. Co.

(*Advance Case, Iowa. October* 14, 1886.)

A railway company is not liable for the death of a passenger where he was killed by being thrown from a platform car by other passengers, and there was nothing in the conduct of such passengers at the time the train left the last station from which the company could reasonably anticipate that an assault would be committed on the deceased by reason of furnishing such a car for transportation.

A judgment *non obstante veredicto* should be granted whether the general verdict is in conflict with the special findings.

Appeal from Poweshiek district court.

Action to recover damages accruing to the estate of which plaintiff is administrator, by reason of injuries received by the intestate through the negligence of defendant's employees, while a passenger upon a train upon defendant's road. There was a judgment upon a verdict for plaintiff. Defendants appeal.

Wright, Cummins & Wright and *Winslow & Varnum* for appellant.

No appearance for appellee.

Beck, J.—The evidence applicable to the issues in the case tended to show that plaintiff, with a large number of other persons, purchased excursion tickets at Brooklyn, upon which they were carried to Grinnell, to attend a circus which gave an exhibition at that town. They were transported back to Brooklyn in a freight train. Many of the passengers were compelled to ride on flat or platform cars, which had no railings or other protections around them to prevent passengers from being thrown from the cars. Plaintiff's intestate started to return from Grinnell upon one of these cars. He was a sober and peaceable young man. There were quarrelsome and drunken men among the persons upon the car on which deceased was riding, who got into an altercation with him, and assaulted him, and finally he was thrown or shoved from the cars by them, and was instantly killed. Upon these and other facts the plaintiff seeks to recover. Applicable to these issues in the case, the district court gave to the jury the following instructions: Facts.

"(8.) If the immediate and direct cause of the death was an

assault made on deceased by one or more fellow-passengers, and this was not a result which defendant or its officers or employees had reasonable ground to expect as a result of the kind of car on which said deceased was permitted to ride at the time of his death, then a failure to furnish other cars of a less dangerous character would not, in itself, if established by the evidence, constitute such negligence as would render defendant liable in this action.

INSTRUCTION TO JURY.

"(9.) It is further alleged in said petition that defendant was negligent in not furnishing a sufficient number of men, and in not exercising sufficient care to guard against assaults by the fellow-passengers of said deceased, and that, by reason thereof, defendant negligently permitted the acts of a fellow-passenger, which resulted in throwing said Fred Felton from the train, and thereby causing his death.

"(10.) Upon this branch of the case you are instructed that it is a general rule of law that a carrier of passengers owes to the persons being carried the duty to protect them from violence and assaults of fellow-passengers, and such carriers will be held responsible for neglect in this particular when, by exercise of proper care, acts of violence might have been foreseen and prevented; and while not required to furnish a police force sufficient to overcome all force, when unexpectedly and suddenly offered, it is the duty of such carrier to provide help sufficient to protect the passengers against assaults from any quarter which might reasonably be expected to occur, under the circumstances of the case, and the condition of the parties.

"(11.) Therefore, if you find from the evidence, by a preponderance thereof, that said deceased, without fault or negligence on his part, was assaulted by one or more of his fellow-passengers while riding on defendant's cars, and was, by reason thereof, thrown from the car on which he was riding, and killed; and that defendant, or its officers or employees, had reasonable ground to believe or expect that such assault might be made, in view of all the facts and circumstances disclosed by the evidence, and failed to make reasonable efforts, through the employees running the train, to guard against or prevent the same, or reasonable provision to guard against or prevent the same, by a reasonably sufficient force of employees for such purpose; and that the death resulted from such neglect to make such efforts or provision—then your verdict in such case should be for the plaintiff for such an amount as the evidence may show him entitled to recover, under the instructions hereinafter given as to the measure of damages.

"(12.) But if defendant, its officers or employees, had no reasonable ground to believe that such an assault would be made, under all circumstances of the case as shown by the evidence, then defendant would not be so liable, even though you find from the evi-

dence that the death might have been prevented had a sufficient force of employees of defendant been present on the train or car."

These instructions are to be regarded as the law of the case.

The jury, in response to interrogatories, made the following special findings: "(1) Do you find that defendant ought reasonably to have anticipated that an assault would be committed on deceased as a result of furnishing the kind of cars upon which deceased was riding at the time of this accident? No. (2) Do you find that deceased was assaulted upon, and, in such assault, pushed or knocked from said train? Yes." "(4) Was there any conduct on the train after it left Grinnell, and before the accident, on the part of any passengers, which indicated danger to the life or safety of deceased, of which the men in charge of the train had actual knowledge? If so, what was it, and who knew it? No." SPECIAL FINDINGS.

2. As we understand the case, the negligence substantially charged against defendant consisted in furnishing cars for the use of deceased and other passengers of insufficient and dangerous character, and in not providing sufficient protection, through employees, to defend the decedent from his assailants. The jury found specially that defendant had no reason to anticipate the assault. Under the eighth instruction, the acts of defendant in furnishing cars of a dangerous character was not negligence rendering defendant liable in this action, in the absence of reasonable grounds to expect that the injury to intestate would result from the defective and dangerous character of the cars. The second special finding shows that the direct and proximate cause of the injury resulting in the death of the intestate was the assault. The fourth special finding is to the effect that there was nothing to justify expectation or fear of danger to the intestate on the part of the employees operating the train. The twelfth instruction is to the effect that, if defendant had no reasonable ground to believe that an assault would have been made, defendant is not liable, even though death might have been prevented had a sufficient number of employees been present on the train. The evidence tends to show no circumstance calculated to warn defendant's employees of the assault, other than the conduct of the assailants, which was unknown to the employees. It follows, from the facts shown by the special findings, that the defendant is not chargeable with negligence, according to the rules of the law as announced by the instructions above quoted. DANGEROUS CARS—PROTECTION FROM ASSAULT.

The district court should have sustained defendant's motion for a judgment *non obstante*, for the reason that the general verdict is in conflict with the special findings.

Reversed.

Liability of Company for Injuries and Assaults upon Passengers.—See Spohn *v.* Mo. Pac. R. Co., and note, 26 Am. & Eng. R. R. Cas. 252–256; Chicago & A. R. Co. *v.* Pillsbury, and note, 26 Ib. 241–256.

VICKSBURG AND MERIDIAN R.

v.

O'BRIEN.

(119 *U. S. Supreme Court Reports*, 99.)

In an action against a railroad company by a passenger to recover for injuries received by an accident to a train, a written statement as to the nature and extent of his injuries, made by his physician while treating him for them, for the purpose of giving information to others in regard to them, is not admissible in evidence against the company, even when attached to a deposition of the physician in which he swears that it was written by him, and that in his opinion it correctly states the condition of the patient at the time referred to.

The declaration of the engineer of the locomotive of a train which meets with an accident, as to the speed at which the train was running when the accident happened, made between ten and thirty minutes after the accident occurred, is not admissible in evidence against the company in an action by a passenger on the train to recover damages for injuries caused by the accident.

THE case is stated in the opinion of the court.

Edgar M. Johnson (with whom were *Mr. George Hoadly* and *Mr. Edward Colston* on the brief) for plaintiff in error.

William Nugent also filed a brief for plaintiff in error.

Thomas C. Catchings for defendants in error.

HARLAN, J.—This action was brought by Mary E. O'Brien and her husband, John J. O'Brien, to recover damages sustained in consequence of personal injuries received by the wife in September, 1881, while a passenger upon the Vicksburg & Meridian R. The declaration alleges that the company "so carelessly, negligently and unskilfully constructed and maintained its railroad track, engine and cars, and so carelessly, negligently and unskilfully conducted itself in the management, control and running of the same," that the car in which Mrs. O'Brien was seated as a passenger was thrown from the railroad track and overturned, whereby she was seriously injured. There was a verdict and judgment for $9000 in favor of thep laintiffs.

FACTS.

1. At the trial the plaintiffs offered to read to the jury the deposition of a physician, and did read the first, second and third interrogatories propounded to him and the answers thereto. Responding to the first and second interrogatories, he stated, among other things, that his attendance upon Mrs. O'Brien commenced on the 16th of September, 1881; that he found her suffering extreme pain and in a very nervous condi-

READING DEPOSITION OF PHYSICIAN AT TRIAL.

tion, resulting a few hours before from a railroad accident on defendant's road; that such was the cause of her injuries he knew from her own answers, from the statement of her brother-in-law, and from attending others who were on the train with her. The third interrogatory and answer were as follows:

"3. Look on the accompanying statement, dated November 26th, 1881, and state if it was written by you at the date it bears, for what purpose it was written and to whom it was delivered. Does the statement represent substantially and correctly Mrs. O'Brien's condition as it appeared when you first saw her, and as it continued up to November 26th, 1881?

"Answer: I have looked upon the statement referred to, which was written by myself, at Mr. O'Brien's request, at the date mentioned, when he was about to take his wife away from here to his home in New Orleans, and was intended to convey an idea of how she was when I was called to see her, and what her condition was when she left my charge; and in my opinion I correctly stated her condition at the times referred to."

The written statement referred to in the interrogatory was signed by the witness, and attached to his deposition as an exhibit. It was addressed to Mr. O'Brien, and sets forth, with much detail, the nature of the injuries received by the wife, and their effect upon her bodily and mental condition. It also embodied an expression of the witness' opinion as to the probable length of time within which she might recover from her injuries. The plaintiff, before reading the remaining interrogatories and answers, offered to read this statement to the jury as evidence. The company objected, upon these grounds: That it was not made by the witness under oath, and in defendant's presence, or with its knowledge and consent; that it was hearsay evidence, and, therefore, wholly incompetent; and that, in any event, it could only be referred to by the witness to refresh his recollection. The court overruled the objection and permitted the statement to be read in evidence, the defendant taking an exception thereto, which was allowed. The remainder of the deposition was then read to the jury.

SAME HELD ERRONEOUS—WHEN MEMORANDUM MAY BE ADMITTED AS EVIDENCE.

We are of opinion that this ruling cannot be sustained upon any principle recognized in the law of evidence. The authorities are uniform in holding that a witness is at liberty to examine a memorandum prepared by him, under the circumstances in which this one was, for the purpose of refreshing or assisting his recollection as to the facts stated in it.

But there are adjudged cases which declare that, unless prepared in the discharge of some public duty, or of some duty arising out of the business relations of the witness with others, or in the regular course of his own business, or with the knowledge and concurrence of the party to be charged, and for the purpose of charg-

ing him, such a memorandum cannot, under any circumstances, be admitted as an instrument of evidence.* There are, however, other cases to the effect that, where the witness states, under oath, that the memorandum was made by him presently after the transaction to which it relates, for the purpose of perpetuating his recollection of the facts, and that he knows it was correct when prepared, although after reading it he cannot recall the circumstances so as to state them alone from memory, the paper may be received as the best evidence of which the case admits.†

The present case does not require us to enter upon an examination of the numerous authorities upon this general subject; for, it does not appear here, but at the time the witness testified he had, without even looking at his written statement, a clear, distinct recollection of every essential fact stated in it. If he had such present recollection, there was no necessity whatever for reading that paper to the jury. Applying, then, to the case the most liberal rule announced in any of the authorities, the ruling by which the plaintiffs were allowed to read the physician's written statement to the jury as evidence, in itself, of the facts therein recited, was erroneous.

TESTIMONY OF PHYSICIAN AS TO FACTS CONTAINED IN CERTIFICATE.

It is, however, claimed, in behalf of the plaintiffs, that in his answers to other interrogatories, the physician testified, apart from the certificate, to the material facts embodied in it, and that, therefore, the reading of it to the jury could not have prejudiced the rights of the defendant, and, for that reason, should not be a ground of reversal.

We are unable to say that the defendant was not injuriously affected by the reading of the physician's certificate in evidence. It is not easy to determine what weight was given to it by the jury. In estimating the damages to be awarded in view of the extent and character of the injuries received, the jury, for aught that the court can know, may have been largely controlled by its statements. The practice of admitting in evidence the unsworn statements of witnesses, prepared, in advance of trial, at the request of one party, and without the knowledge of the other party, should not be encouraged by further departures from the established rules of evidence.

While this court will not disturb a judgment for an error that did not operate to the substantial injury of the party against whom

* Note by the court.—Lightner v. Wike, 4 S. & R. 203; Calvert v. Fitzgerald, Litt. Sel. Cases 388; Lawrence v. Barker, 5 Wend. 305; Redden v. Spruance, 4 Harrington (Del.) 265, 267-8; Field v. Thompson, 119 Mass. 151.

† Note by the court.—Russell v. Hudson River R., 17 N. Y. 134, 140; Guy v. Mead, 22 N. Y. 465; Merrill v. Ithaca & Oswego R., 16 Wend. 586 ;s. c., 30 Am. Dec. 130; Kelsea v. Fletcher, 48 N. H. 282; Haven v. Wendell, 11 N. H. 112; Mims v. Sturdevant, 36 Ala. 636, 640; State v. Rawle, 2 Nott & McCord 331, 334.

it was committed, it is well settled that a reversal will be directed unless it appears, beyond doubt, that the error complained of did not and could not have prejudiced the rights of the party. Smiths *v.* Shoemaker, 17 Wall. 630, 639; Deery *v.* Gray, 5 Wall. 795; Moores *v.* Nat. Bank, 104 U. S. 625, 630; Gilman *v.* Higby, 110 U. S. 47, 50.

2. At the trial below, plaintiffs introduced one Roach as a witness, who, during his examination, was asked whether he did not, shortly after the accident, have a conversation with the engineer having charge of defendant's train at the time of the accident, about the rate of speed at which the train was moving at the time. To that question the defendant objected, but its objection was overruled, and the witness permitted to answer. The witness had previously stated that, on examination of the track after the accident, he found a cross-tie or cross-ties under the broken rail in a decayed condition. His answer to the above question was: "Between ten and thirty minutes after the accident occurred, I had such a conversation with Morgan Herbert, the engineer having charge of the locomotive attached to the train at the time of the accident, and he told me that the train was moving at the rate of eighteen miles an hour." The defendant renewed its objection to this testimony by a motion to exclude it from the jury. This motion was denied, and an exception taken. As bearing upon the point here raised it may be stated that, under the evidence, it became material—apart from the issue as to the condition of the track—to inquire, whether, at the time of the accident, (which occurred at a place on the line where the rails in the track were, according to some of the proof, materially defective,) the train was being run at a speed exceeding fifteen miles an hour. In this view, the declaration of the engineer may have had a decisive influence upon the result of the trial.

ENGINEER'S DECLARATION CONCERNING SPEED OF TRAIN.

There can be no dispute as to the general rules governing the admissibility of the declarations of an agent to affect the principal. The acts of an agent, within the scope of the authority delegated to him, are deemed the acts of the principal. Whatever he does in the lawful exercise of that authority is imputable to the principal, and may be proven without calling the agent as a witness. So, in consequence of the relation between him and the principal, his statement or declaration is, under some circumstances, regarded as of the nature of original evidence, "being," says Philips, "the ultimate fact to be proved, and not an admission of some other fact." 1 Phil. Ev. 381. "But it must be remembered," says Greenleaf, "that the admission of the agent cannot always be assimilated to the admission of the principal. The party's own admission, whenever made, may be given in evidence against him; but the admission or declaration of his agent binds him only when it

ADMISSION OF AGENT'S DECLARATIONS AFFECTING PRINCIPAL.

is made during the continuance of the agency in regard to a transaction then depending, *et dum fervet opus*. It is because it is a verbal act and part of the *res gestæ* that it is admissible at all; and, therefore, it is not necessary to call the agent to prove it; but wherever what he did is admissible in evidence, there it is competent to prove what he said about the act while he was doing it." 1 Greenleaf, § 113. This court had occasion in Packet Co. *v.* Clough, 20 Wall. 540, to consider this question. Referring to the rule as stated by Mr. Justice Story in his Treatise on Agency, § 134, that "where the acts of the agent will bind the principal, there his representations, declarations, and admissions respecting the subject matter will also bind him, if made at the same time, and constituting part of the *res gestæ*," the court, speaking by Mr. Justice Story, said: "A close attention to this rule, which is of universal acceptance, will solve almost every difficulty. But an act done by an agent cannot be varied, qualified, or explained, either by his declarations, which amount to no more than a mere narrative of a past occurrence, or by an isolated conversation held, or an isolated act done, at a later period. The reason is that the agent to do the act is not authorized to narrate what he had done, or how he had done it, and his declaration is no part of the *res gestæ*."

ENGINEER'S STATEMENT NOT COMPETENT TO PROVE SPEED OF TRAIN.

We are of opinion that the declaration of the engineer Herbert to the witness Roach was not competent against the defendant for the purpose of proving the rate of speed at which the train was moving at the time of the accident. It is true that, in view of the engineer's experience and position, hisestatements under oath, as a witness, in respect to that matter, if credited, would have influence with the jury. Although the speed ofthe train was, in some degree, subject to his control, still his authority, in that respect, did not carry with it authority to make declarations or admissions at a subsequent time, as to the manner in which, on any particular trip, or at any designated point in his route, he had performed his duty. His declaration, after the accident had become a completed fact, and when he was not performing the duties of engineer, that the train, at the moment the plaintiff was injured. was being run at the rate of eighteen miles an hour, was not explanatory of anything in which he was then engaged. It did not accompany the act from which the injuries in question arose. It was, in its essence, the mere narration of a past occurrence, not a part of the *res gestæ*—simply an assertion or representation, in the course of conversation, as to a matter not then pending, and in respect to which his authority as engineer had been fully exerted. It is not to be deemed part of the *res gestæ*, simply because of the brief period intervening beween the accident and the making of the declaration. The fact remains that the occurrence had ended when the declaration in question was made, and the engineer was not

in the act of doing anything that could possibly affect it. If his declaration had been made the next day after the accident, it would scarcely be claimed that it was admissible evidence against the company. And yet the circumstance that it was made between ten and thirty minutes—an appreciable period of time—after the accident, cannot, upon principle, make this case an exception to the general rule. If the contrary view should be maintained, it would follow that the declarations of the engineer, if favorable to the company, would have been admissible in its behalf as part of the *res gestæ*, without calling him as a witness—a proposition that will find no support in the law of evidence. The cases have gone far enough in the admission of the subsequent declarations of agents as evidence against their principals. These views are fully sustained by adjudications in the highest courts of the States.*

We deem it unnecessary to notice other exceptions taken to the action of the court below.

This case was decided at the last term of this court, and Mr. Justice Woods concurred in the order of reversal upon the grounds herein stated.

For the errors indicated the judgment is reversed, and the cause remanded for a new trial, and for further proceedings consistent with this opinion.

FIELD, J., with whom concurred the Chief Justice, MILLER, J., and BLATCHFORD, J., dissenting.—I am not able to give my assent to the judgment of the court in this case.

The statement by the physician as to the condition of the injured party, the admission of which is held to have been error, was proved by his deposition to have been correct. Every material fact also which it contained was established by his independent testimony. It would not be in accordance with the usual action of men, in the ordinary concerns of life, to reject as incompetent evidence, a written statement thus made by a physician as to the condition of a patient under his charge, when it is subsequently proved by him to be true in all its details. And it should seem that evidence upon which every one would act with-

ADMISSION OF PHYSICIAN'S STATEMENTS.

* Note by the court.—Luby *v.* Hudson River R. 17 N. Y. 131; Pennsylvania R. *v.* Brooks, 57 Penn. St. 339, 343; Dietrick *v.* Baltimore, etc., R. 58 Maryland 347, 355; Lane *v.* Bryant, 9 Gray 245; s. c. 69 Am. Dec. 282; Chicago, Burlington, etc., R. *v.* Riddle, 60 Ill. 534; Virginia & Tennessee R. *v.* Sayers, 26 Gratt. 328, 351; Chicago & N. W. R. *v.* Fillmore, 57 Ill. 265; Michigan Central R. *v.* Coleman, 28 Mich. 440, 446; Mobile & Montgomry R. *v.* Ashcraft, 48 Ala. 15, 30; Bellefontaine R. *v.* Hunter, 33 Ind. 335, 354; Adams *v.* Hannibal & S. J. R., 74 Mo. 553, 556; s. c., 7 Am. & Eng. R. R. Cas. 416, and note; Kansas & Pacific R. *v.* Pointer, 9 Kan. 620, 630; Roberts *v.* Burks, Litt. (Ky.) Select Cas. 411; s. c., 12 Am. Dec. 325; Hawker *v.* Baltimore & Ohio R., 15 West Va. 628, 636. See also 1 Taylor Ev., 7th Eng. Ed. § 602.

out hesitation in the common affairs of life, ought not to be excluded from consideration, except for clear reasons of policy, or long established rules to the contrary, when those affairs are brought into litigation before the courts.

If the recollection of the condition of the patient had passed from the mind of the physician, and he could still have testified that the statement made by him when the patient was under his charge was true, it would have been admissible. It is difficult, therefore, to find any just reason for excluding it, from the fact that, in corroboration of its truth, the physician also testified to the facts therein stated.

DECLARATION OF ENGINEER ADMISSIBLE AS PART OF RES GESTÆ.

The admission of the declaration of the engineer, as to the rate of speed of the train at the time of the accident, was, in my judgment, admissable as part of the *res gestæ*. The rails and cross-ties of the road were in a bad condition. Some of the rails had been used for over forty years, and some of the cross-ties were decayed, and it appears that the accident was caused by a decayed cross-tie and a broken rail.

As the declaration was made between ten and thirty minutes after the accident, we may well conclude that it was made in sight of the wrecked train, and in presence of the injured parties, and whilst surrounded by excited passengers. The engineer was the only person from whom the company could have learned of the exact speed of the train at the time; to him it would have been obliged to apply for information on that point. It would seem, therefore, that his declaration, as that of its agent or servant, should have been received. The modern doctrine has relaxed the ancient rule, that declarations, to be admissible as a part of the *res gestæ*, must be strictly contemporaneous with the main transaction. It now allows evidence of them, when they appear to have been made under the immediate influence of the principal transaction, and are so connected with it as to characterize or explain it.

The case of the Hanover R. Co. *v.* Coyle, 55 Penn. St. 396, 402, is in point. There it appeared that a peddler's wagon was struck by a locomotive and the peddler was injured; and the question was as to the admissibility of the declaration of the engineer that the train was behind time, to show carelessness and negligence. The Supreme Court of Pennsylvania held it admissible. "We cannot say," said the court, "that the declaration of the engineer was no part of the *res gestæ*. It was made at the time, in view of the goods strewn along the road by the breaking up of the boxes, and seems to have grown directly out of and immediately after the happening of the fact. The negligence complained of being that of the engineer himself, we cannot say that his declarations, made upon the spot, at the time, and in view of the effects of his

conduct, are not evidence against the company as a part of the very transaction itself."

What time may elapse between the happening of the event in respect to which the declaration is made, and the time of the declaration, and yet the declaration be admissible, must depend upon the character of the transaction itself. An accident happening to a railway train, by which a car is wrecked, would naturally lead to a great deal of excitement among the passengers on the train, and the character and cause of the accident would be the subject of explanation for a considerable time afterwards by persons connected with the train. The admissibility of a declaration, in connection with evidence of the principal fact, as stated by Greenleaf, must be determined by the judge according to the degree of its relation to that fact, and in the exercise of a sound discretion, it being extremely difficult, if not impossible, to bring this class of cases within the limits of a more particular description. The principal points of attention are, he adds, whether the declaration was contemporaneous with the main fact, and so connected with it as to illustrate its character.

But independently of this consideration, there is another answer to the objection taken to the admissibilty of the declaration of the engineer. It was immaterial in any view of the case. The engagement of a railroad company is to carry its passengers safely; and from any injury arising from a defect in its road, or in the rails or ties, which could have been guarded against by the exercise of proper care, it is liable. Its liability does not depend upon the speed of the train, whether it was one mile or eighteen miles an hour. Though as a carrier of passengers it is not, like a carrier of property, an insurer against all accidents except those caused by the act of God or the public enemy, it is charged with the utmost care and skill in the performance of its duty; and this implies not merely the utmost attention in respect to the movement of the cars, but also to the condition of the road, and of its ties, rails, and all other appliances essential to the safety of the train and passengers. For all injuries through negligence, to which the passenger does not contribute by his own acts, it is liable.

SPEED OF TRAIN IMMATERIAL.

So it matters not what the speed of the train was in the case at bar, nor what was the declaration of the engineer in that respect.

I am authorized to state that the Chief Justice, Mr. Justice Miller, and Mr. Justice Blatchford concur in this dissent.

Admission in Evidence of Declarations of Servants.—See McDermott *v.* Hannibal, etc., R. Co. 2 Am. & Eng. R. R. Cas. 85; B. &. O. R. Co. *v.* S. S. Ind. Dist., 2 Ib. 166; Penna. Co. *v.* Rudel, 6 Ib. 30; Adams *v.* Hannibal & St. Jo. R. Co., 7 Ib. 414; McLeod *v.* Gunther, 8 Ib. 162; Jones *v.* Lake Shore, etc., R. Co., 8 Ib. 221; Meyer *v.* Virginia, etc., R. Co., 9 Ib. 175; Moore *v.* Chicago, etc., R. Co. 9 Ib. 401; Curl *v.* Chicago, etc., R. Co,. 11 Ib. 85; Dietrick *v.* Baltimore, etc., R. Co., 11 Ib. 115; McLeod *v.* Guuther, 15 Ib. 291;

Sacalaies *v.* Eureka, etc., R. Co., 16 Ib. 580; Phelph *v.* George Creek, etc., R. Co., 16 Ib. 600; Patterson *v.* Wabash, etc., R. Co., 18 Ib. 130; Alabama, etc., R. Co. *v.* Hawk, 18 Ib. 194; Hewitt *v.* Chicago, etc., R. Co., 18 Ib. 569; Branch *v.* Wilmington, etc., R. Co., 18 Ib. 621; Baltimore, etc., R. Co. *v.* State, 19 Ib. 83; Louisville, etc., R. Co. *v.* Falvey, 23 Ib. 522; Durkee *v.* Cent. Pac. R. Co., 25 Ib. 350.

INTERNATIONAL AND GREAT NORTHERN R. CO.

v.

UNDERWOOD.

(64 *Texas*, 463.)

Though the right to have an examination made of one who sues to recover damages for permanent injuries to his person, in order that their extent may be known, and to have it done by skilled persons under order of the court, has been maintained, when shown to be necessary to further the ends of justice; yet, a cause will not be reversed for a refusal to order such an examination made, in the absence of a showing that it was necessary to a full presentation of all the facts, and where it was not shown that the plaintiff was unwilling to submit to an examination by any competent person.

The charge of the court should always be so framed as to present to the jury the issues made by the pleadings, if there be evidence under them, unless an issue be abandoned, concerning which abandonment the jury should be instructed.

When a petition claims exemplary damages for an alleged wrong, and a question exists as to whether the evidence shows such facts as will sustain the claim, a charge should be given on that subject unless, in consequence of of an oral statement made in court, the court by a charge withdraws the consideration of such claim for exemplary damages from the jury.

To withdraw such a claim from the consideration of the jury simply by a verbal declaration by counsel of its abandonment, made after the evidence is closed, and during argument, is not sufficient. It should be withdrawn from the consideration of the jury in the charge of the court, distinctly calling their attention to the fact that it is abandoned, and charging them as to the remaining issues.

In a suit against a railway company for damages resulting from personal injury to a passenger, the court charged the jury: "It is the duty of the defendant to exercise proper care to transport its passengers safely, and the want of such care is deemed in law negligence, for which the defendant is liable." *Held*, error, because susceptible of the construction that the failure to exercise a degree of care which will actually result in the safe carriage of passengers is negligence, for which the carrier would be liable.

APPEAL from Bexar. Tried below before the Hon. Geo. H. Noonan.

Nathan Underwood brought this suit for damages for personal in-

juries alleged to have been sustained by him while a passenger, in consequence of defendant's negligence.

The damages claimed were:

"For loss of time from his business from July 5, 1883, to filing of petition	$2,500 00
For doctors', medical and nurses' bills	500 00
For bodily pain and physical and mental fear, suffering and anguish	5,000 00
For diminished capacity to labor, in the loss of the proper and perfect use of his limbs, and his liability to future disease and suffering, and in the loss of his business	20,000 00

"Making in all the sum of twenty-eight thousand dollars ($28,000) actual damages, which the defendant is legally liable and bound to pay to plaintiff, together with exemplary damages in the additional sum of five thousand dollars ($5000)."

The plaintiff, during the progress of the cause, abandoned, orally, before the jury, the claim for exemplary damages.

Verdict and judgment in favor of plaintiff against defendant in the sum of fifteen thousand dollars ($15,000.)

A written motion was made and refused asking an examination of the plaintiff by experts, to determine the extent and permanence of his injuries.

The plaintiff testifying on the trial, stated: "I was scalded from my abdomen down; my left leg was smashed and my right leg was broken, and my knee was hurt; my right leg is about one inch and a half shorter than my left, and it was occasioned by the accident. I have done some business since, but for four months I could do nothing. My time lost was worth two or three thousand dollars—about twenty-five hundred dollars. I paid Doctor Graves $75 and Doctor Herff $10, and for nurses $100 and for medicine $25. Five thousand dollars is a reasonable amount for mental anguish and suffering. I can hardly do any work. I could formerly do much more work than now. I can ride on horseback. I can hardly estimate my damages for the permanent injury to my leg and my diminished capacity to labor. I shall have to limp all my life, and would not have done it for the whole railroad; but if I must put it in money, I ought to have $50,000.

"I was shipping horses on the train on which I was hurt. I had three car-loads. I had a partner. I had about $5000 of capital invested in my business. I generally made from three hundred to five hundred dollars on a car-load. I have shipped cattle also. I never lost any money in the business. I have shipped to points on this side of St. Louis, and averaged on these shipments about $100 on a car-load.

"I do not remember how many car-loads of stock I shipped last year before I was hurt. I have not shipped any horses since, but I have been in the business. My partner now does the shipping. I

have had, since the accident, an interest in four or five car-loads of cattle and two three car-loads of horses."

Dr. George Cupples, a witness for defendant, testified: "I reside in San Antonio. I have been practicing surgery for forty years or longer. I examined Mr. Underwood to-day. There was a fracture of the thigh bone, and it is about two inches shorter than the other. This shortening does not necessitate the use of a crutch or stick. He is able to get around and do general work."

Dr. Hadra, a witness for defendant, testified: "I reside in San Antonio. I have had considerable experience as a surgeon. I made the examination in connection with Dr. Cupples. The knee joint is perfectly movable and useful. There is no stiffening. The leg is more of a deformity than a disability."

McLeary & Barnard for appellant.

Houston Bros. for appellee.

STAYTON, A. J.—It is unnecessary to consider whether the petition was sufficient to authorize the recovery of exemplary damages, for the claim to exemplary damages was waived on the trial and is not asserted here; the propriety of the action of the court, however, in refusing to instruct the jury as to the facts which would authorize the imposition of exemplary damages, in view of the general charge given, the amount of the verdict, and the failure of the appellee otherwise than orally, in the trial of the case, to renounce the claim for such damages, made in the pleadings, will be hereafter considered.

It not appearing that the appellant exhausted its peremptory challenges, or that, by the ruling of the court as to the qualification of the jurors McGowan and Taylor, the appellant was compelled to accept any juror that it was not willing should sit in the case, it is unimportant whether the ruling of the court in this respect was correct or not.

APPOINTMENT OF EXPERTS TO EXAMINE PLAINTIFF.

The appellant presented a motion requesting the court to appoint three disinterested surgeons and physicians to examine the person of the plaintiff, for the purpose of ascertaining the extent and character of his injuries, that they might testify in the case in reference thereto.

This motion stated no fact which made the granting of it necessary. It was not shown to be necessary to the full presentation of all the facts, nor was it shown that the plaintiff was unwilling to have such an examination made by any respectable surgeon or physician.

The right to have such an examination made, when it is shown to be necessary to the ends of justice, has been maintained. Schraeder *v.* R. Co., 47 Iowa 375.

Under what circumstances such a right exists, and may be enforced, it is not necessary in this case to determine.

It certainly will not be recognized and enforced unless shown to be essential to the ends of justice.

The granting of such a motion would ordinarily carry with it the idea that the coercive order of the court was necessary in consequence of the unwillingness of the party to be examined, and such unwillingness might be attributed to an indisposition of the person to have the truth known.

No such impressions should be made unless ground for them is shown by the refusal of the person to be examined.

As presented, we are of the opinion that the court did not err in overruling the motion.

But if this were not so, it would be unimportant in this case, for it appears that the plaintiff did submit to an examination by several surgeons and physicians, whose learning and integrity is vouched for by the appellant in the fact that it used them as witnesses in the case, and had them relate the result of their examination.

By his pleading, the appellee sought to recover exemplary as well as actual damages, and there was no renunciation of this claim otherwise than by counsel orally in course of presenting the case.

RECOVERY OF EXEMPLARY DAMAGES—CHARGE TO JURY.

The charge of the court was silent upon this matter, except that the jury were instructed in case they found certain facts to exist: "You will, in that event, allow as compensation to plaintiff, for such injuries, such actual damages as he has proven to have sustained;" and they were informed what matters they might consider in estimating such damages.

The appellant sought to have charges given under which the jury would have been informed what facts would authorize the allowance of exemplary damages.

It was not claimed, either in the pleadings or by the evidence, that the injury resulted from any defect in the road or cars, but that it resulted from the negligence of the employees of the railway company.

The charges asked went to the question of the liability of the appellant for exemplary damages if it had used due care to employ and had employed and retained none but skilful, sober and careful employees.

While the charges asked may not have been entirely correct, yet they were such as called the attention of the court to the propriety of giving some charge upon the facts which would render the appellant liable for exemplary damages, unless by a charge that issue was withdrawn from the jury. The bill of exceptions shows that the court was unwilling, or thought it unnecessary, to give any charge upon that subject.

Under this state of facts the appellant was not called upon to ask charges which the court from the bill of exceptions would evidently have refused, however correct in form.

The charge in every case should be framed so as to present to the jury the issues made by the pleadings, if there be evidence under them, unless an issue be abandoned and the jury so instructed. In this case the pleadings claimed that there was such negligence on the part of the appellant as entitled the appellee to exemplary damages, and it was for the jury to determine whether the proof was sufficient to sustain the claim.

There was evidence tending to show a high degree of negligence in the employees of the appellant.

When a petition claims exemplary damages, and there is a question as to whether the evidence shows such facts as would sustain such a claim, we are of the opinion that a charge should be given upon that subject, unless, in consequence of an oral statement made in court by the plaintiff or his counsel, the court by a charge withdraws such claim entirely from the jury.

The issues between the parties are made by the pleadings, and when a claim and issue is thus presented, correct practice requires that, if desired, it should be withdrawn in the same way.

To withdraw such an issue and claim by a mere verbal declaration to the effect that it is not insisted upon, after all the evidence has been introduced, and so, by a mere declaration of counsel, made as it is claimed it was done in this cause, during the argument of the cause, may, in causes in which the court does not entirely withdraw the given issue from the jury, if a general verdict is found, result in a verdict and judgment made up by the jury according to their own notions of the law applicable to the case.

Such a verdict may embrace elements of damage which should not be embraced, or may be upon an erroneous view of the law, and to guard against this, in the case before us, we are of the opinion that a charge should have been given by which the jury should have been instructed as to the rules applicable to the claim for exemplary damages, or, by a charge, that question should have been entirely withdrawn from the jury.

The verdict was a general one for $15,000. The injuries to the appellee were shown to be of a very serious character; but, in the light of the evidence contained in the record, it seems to us that the verdict was higher than justified by the evidence for actual damages; and, it may be, had the court by a charge withdrawn the claim for exemplary damages from the jury, or given a proper charge upon the question of the right of the appellee to recover exemplary damages, that the verdict would have been less.

The charge of the court was not clear, and may have misled the jury, in that it did not instruct the jury as to the degree of care necessary to be used by a carrier of passengers.

That part of the charge which attempted to inform the jury as to the degree of care incumbent on the appellant, and as to what would constitute negligence, was as follows:

"It is the duty of the defendant to exercise proper care to transport its passengers safely, and the want of such care is deemed in law negligence, for which the defendant is liable."

The judge who tried this cause certainly did not intend to inform the jury that a carrier of passengers must use such care as will actually result in the safe carriage of passengers, and that the exercise of a degree of care which does not accomplish that result was negligence for which the carrier would be liable; for this would be to make the carrier an insurer. CHARGE CONCERNING DEGREE OF CARE REQUIRED OF COMPANY.

The charge is susceptible of such a construction, and may have been so understood by the jury; it is likely, however, in view of the facts, that the jury were not misled by this, when considered in connection with the one which followed it.

The excessive character of the verdict was urged as a ground for new trial, and the refusal to give it is assigned as error.

For this ruling of the court below, and for the matters before referred to, the judgment will be reversed and the cause remanded.

It is so ordered.

Reversed and remanded.

Examination of the Person in Cases of Personal Injury, by Order of the Court.—The plaintiff who claims damages for personal injury may be required by the court, on the defendant's application, to submit his person to be examined by experts. Pierce on Railroads, 298. The plaintiff brought an action to recover damages for injuries arising from the alleged negligence of the defendant in moving a train of cars on which she was a passenger. After issue joined, an order was made, upon the defendant's application, requiring the plaintiff to submit to an examination of her person by three physicians named in the order, and selected by the defendant, under the direction of a referee therein named. It provided that such other physicians as the plaintiff might desire might be present, and that at the examination she should answer such questions as should be put to her touching her then present sensations by the physicians selected by the defendant. *Held*, that the court had no power to make such an order. Roberts *v.* Ogdensburg & Lake Champlain R. Co., 29 Hun (N. Y.) 154. Courts may compel an injured plaintiff to submit to a surgical examination. Schroeder *v.* Chicago, Rock Island & Pacific R. Co., 47 Ia. 375. In an action for damages for personal injuries of a permanent as well as temporary character to the plaintiff's eyes, where the plaintiff testified concerning his injuries, and no physician was examined as a witness in the case, the plaintiff may be required by the court, in its discretion, upon a proper application being made therefor by the defendant, to submit his eyes to a reasonable and proper examination by some competent expert for the purpose of ascertaining the nature, extent and permanency of his injuries. Atchison, Topeka & Santa Fé R. Co. *v.* Thul, 29 Kan. 466. See also note to Atchison, etc., R. Co. *v.* Thul, 10 Am. & Eng. R. R. Cas. 791.

PFISTER
v.
CENTRAL PACIFIC R. CO.

(*Advance Case, California. July* 19, 1886.)

The plaintiff, the county treasurer of Santa Clara county, and three employees were passengers on a train on defendant's road, for the purpose of going from San Jose to Sacramento. They had with them, in small leather satchels, $91,952, in gold coin, due the State from the plaintiff as county treasurer, and which they were taking to deliver to the State treasurer. No objection was made by the conductor of the train, who had knowledge of the contents of the satchels, until they reached Niles, a way station on the road. Here it was necessary to change cars, and the conductor from Niles refused to permit the plaintiff and his employees to enter the train with their treasure, and required him to deliver the same to the Wells, Fargo Express Co., to whom the defendant had given the exclusive privilege of carrying money on its trains. The plaintiff at first refused to do this, and offered to go into the baggage car and pay any charges which might be exacted for the transportation of the money. This offer was refused, and, to avoid being left at Niles, the plaintiff delivered the money to the express company, paying for the transportation $68.95. In an action against the company for refusing to carry the treasure, it was *held*,

1. That money intended for trade, business, or investment, or for transportation and not intended for the passenger while travelling, is not luggage.

2. That the plaintiff's railroad ticket entitling him to transportation in a first-class passenger coach, and to have his luggage transported free of charge, gave him no right to travel in a baggage, express or freight car, but only in such passenger coach; and no right to transport either at his charge or that of the company any merchandise or property not included in the term "luggage."

3. That the plaintiff was not a "messenger," within the meaning of Cal. St. 1863–64, p. 344, imposing upon railroads the duty of transporting messengers and others upon certain occasions.

4. That railroad companies are not required to furnish express facilities to all alike who demand them.

5. That the duty of the carrier is confined, as is provided in the Code of California, to accepting and carrying property "of a kind that he undertakes or is accustomed to carry."

Department 2.
W. H. L. Barnes for respondent.
J. J. Burt for appellant.

SEARLS, C.—This is an action to recover from the defendant, a corporation engaged in the business of a common carrier of passengers and freight for hire, by cars drawn over a railroad by steam-
FACTS. engines, damages in the sum of $50,000, for refusing to carry certain treasure for plaintiff. Defendant interposed a

demurrer to the complaint, which was sustained by the court, and judgment, upon refusal by plaintiff to amend, was entered in favor of defendant, from which judgment this appeal is taken.

It appears from the complaint that the plaintiff was the county treasurer of the county of Santa Clara, and as such it was his duty to pay over and deliver to the State treasurer, at Sacramento, Cal., certain funds due the State from him as such county treasurer. On the nineteenth day of January, 1883, plaintiff purchased from the defendant at San Jose, in the county of Santa Clara, for $16, four first-class passenger tickets, entitling four persons to first-class passage from said San Jose to Sacramento. Furnished with these tickets, plaintiff and three employees, having with them $91,952 in gold coin of the United States, contained in small leather satchels, which they carried in their hands, boarded a passenger train of defendant with such treasure, and were permitted by the conductor, who had knowledge of the contents of the satchels, to retain possession of and carry the same as far as Niles, a way station on the railroad leading to Sacramento, where it became necessary to change cars and take another train for the latter place. The conductor of the train from Niles refused to permit plaintiff and his employees to enter the passenger car with their treasure, and required plaintiff, if he desired to carry said money to Sacramento, to deliver the same to Wells, Fargo & Co., an express company, engaged as common carriers for hire in the business of carrying treasure, and that class of goods known as "express matter," over the railroad of defendant, from San Jose to Sacramento, and to which company defendant had given the exclusive privilege of carrying money upon its trains from San Jose to Sacramento, so far as such money exceeded such sums as might be carried by a passenger travelling on its trains.

Defendant had provided accommodations for Wells, Fargo & Co. in a baggage car; had not provided any special cars for persons generally having money to carry to Sacramento; and all such persons, under the rules and regulations of defendant, were obliged to give up to Wells, Fargo & Co., for transportation, all money outside of that which they could carry as passengers. Plaintiff at first refused to surrender his money to Wells, Fargo & Co., and insisted that he and his employees had a right to go into some car of the train without any extra charge for carrying the money beyond their regular passenger fare; but at the same time told the conductor that rather than be left at Niles, or give up the custody of his treasure to Wells, Fargo & Co., he would go into the baggage or any other car of defendant which might be designated, and would pay to defendant any charges which might be exacted for the transportation of the money—all of which was refused; and plaintiff thereupon, to avoid being left at Niles, delivered the

money to the express company for transportation to Sacramento, paying for such transportation the sum of $68.95.

The money which plaintiff was carrying was funds which he, as county treasurer, had received and was conveying to Sacramento to pay over to the State treasurer—being due from him in his official capacity to the State of California; and his employees were taken along as guards of said money and to aid in carrying the same—all of which was known to defendant. It had been the custom of the defendant for 10 years prior to January 19, 1883, to permit the county treasurer to carry like money in like satchels, upon its passenger trains, free of charge, and no notice was given to plaintiff of any change in such custom. At the date when said money was carried to Sacramento the defendant did not receive and transport money as freight; did not permit persons to travel on its freight trains and carry money as freight; would not check and carry the same as baggage on its passenger trains; and would not have received said money for transportation as freight, baggage or otherwise; and the only way by which the plaintiff could have transported his money to Sacramento by said railroad was by carrying it himself, or by delivering it to Wells, Fargo & Co. for transportation, as required by defendant.

The complaint further proceeds to show, in apt language, that the defendant is subject to, bound by, and, by express agreement duly filed, has accepted and is bound to execute on its part, the duties, and discharge the obligations, imposed by an act of the legislature of the State of California, approved April 4, 1864, entitled "An act to aid the construction of the Central Pacific R., and to secure the use of the same to this State for military and other purposes, and other matters relating thereto;" and showing that the railroad from San Jose to Sacramento is a portion of the railroad to which said act of the legislature is applicable.

The defendant was a common carrier of passengers and freight between San Jose and Sacramento, and, upon receiving the reasonable and customary payment therefor, it was its duty to receive and carry upon its passenger trains all persons desiring to travel thereby, with a reasonable amount of luggage for each passenger, without charge, except for an excess of weight over 100 pounds. Civil Code, § 2180. "Luggage may consist of any articles intended for the use of a passenger while travelling, or for his personal equipment." Civil Code, § 2181. "The liability of a carrier for luggage received by him with a passenger is the same as that of a common carrier of property." Civil Code, § 2182. A common carrier by railroad must check and carry, in a regular baggage car, the luggage of passengers over his road, and must deliver such luggage immediately upon the arrival of the passenger at his destination; and whenever passen-

DUTY OF CARRIERS AS TO BAGGAGE—MONEY AS.

gers neglect or refuse to have their luggage so checked and transported it is carried at their own risk. Civil Code, § 2183.

The question of whether money can or cannot be treated as luggage has been frequently determined by the courts, and, usually, to the effect that, except as to such limited amount as may be necessary for personal use to defray expenses of the passenger, it is not luggage. Orange Co. Bank *v.* Brown, 9 Wend. 85; Pardee *v.* Drew, 25 Wend. 459; Mississippi Cent. R. Co. *v.* Kennedy, 41 Miss. 671; Smith *v.* Boston M. R., 44 N. H. 325; Cincinnati & C. A. L. R. Co. *v.* Marcus, 38 Ill. 219; Michigan Southern & N. I. R. Co. *v.* Oehm, 56 Ill. 293; Jordan *v.* Fall River R. Co., 5 Cush. 69; Hawkins *v.* Hoffman, 6 Hill, 586; Hickox *v.* Naugatuck R. Co., 31 Conn. 281; Hutchings *v.* Railroad Co., 25 Ga. 61.

Some of the cases cited *supra* hold that neither money nor merchandise are included in the term "baggage." We do not find it necessary, however, to decide that precise point in this case. The terms "baggage" and "luggage" signify one and the same thing. The former is the term in general use in the United States, while in England the latter prevails. Our Code has adopted the English expression.

We think it clear, alike from § 2181 of the Civil Code and from adjudicated cases, that money intended for trade, or business, or investment, or, as in this case, for transportation, and not intended for the use of the passenger while travelling, is not luggage. It follows that plaintiff and his employees had no right to transport, as luggage, the money in question upon the passenger and express train of defendant.

The right of plaintiff as a passenger must be determined by the contract he made with defendant. He purchased four first-class passenger tickets from San Jose to Sacramento, which entitled him and his three employees to transportation in the first-class passenger coaches of defendant between the points indicated, and gave to them a right to have their luggage, not exceeding 100 pounds to each person, transported at the same time free of charge. It gave to them no right to travel in a baggage, express or freight car, but in the regular passenger car or cars of the defendant; and the contract gave to them no right to transport, either in their own charge or that of the defendant, any merchandise or property not included in the term "luggage." The law takes no note of what property a passenger carries upon his person, but beyond this he may not, by virtue of his contract for passage, carry, either free of charge or by paying an extra charge, property not included within the import of the term "luggage." Were it otherwise, it would be within the power of the passenger to convert the passenger coaches of a railroad company into vans for the transportation of merchandise, or to compel the carrier to do much the same thing by furnishing baggage cars for the conduct

PASSENGER CANNOT CARRY PROPERTY NOT INCLUDED IN TERM "LUGGAGE."

of ordinary freight. The orderly and expeditious transit of passengers and their baggage renders it necessary and proper for the carriers engaged in their transportation to run separate trains for their accommodation, or, at least, to furnish and transport them in cars separate from those devoted to the carriage of freight; and this result can only be accomplished by requiring the carrier, on the one hand, and the passenger upon the other, to refrain from making passenger cars the receptacle for merchandise.

Plaintiff must be presumed to know the legal effect of the contract he had made, and to be subject to its terms, conditions, and limitations equally with the defendant. The fact that for 10 years the defendant had permitted the county treasurers of Santa Clara county to carry with them, upon its passenger trains, the money which they were by law required to pay over to the State treasurer, neither enlarged nor abridged the contract between it and plaintiff. If defendant was not legally bound to extend this favor, its liberality to others, or to plaintiff himself, could not be urged as a binding rule for the continuance of such practice.

The theory of plaintiff that, by having accepted him as a passenger with knowledge of the money he had with him, the defendant became a common carrier of him and his money, though he retained possession of the latter, is not sustained by the authorities cited. Minter *v.* Pacific R., 41 Mo. 504; Butler *v.* Hudson R. R. Co., 3 E. D. Smith 571; Stoneman *v.* Erie R. Co., 52 N. Y. 429; Sloman *v.* Great Western R. Co., 67 N. Y. 208, and Hannibal R. *v.* Swift, 12 Wall. 262, were all cases in which the property was delivered to the carrier; and, although not baggage, it was held that, having received it with knowledge that it was not the ordinary travelling baggage of the passenger, the liability of a common carrier attached.

We are clearly of opinion that the defendant was under no obligation, by virtue of its contract of passage with plaintiff as an individual, to permit him to carry with him in its passenger car the sum of money indicated, in the manner indicated, and weighing, as it must have done, between 300 and 400 pounds. Whether, independent of contract, the defendant was or was not, as a common carrier, in duty bound to receive and transport the money of the plaintiff, depends upon other considerations affecting such duty, and will be considered hereafter.

PLAINTIFF'S RIGHTS AS COUNTY TREASURER.

But appellant contends, second, that if, as a private citizen, the treatment of plaintiff would have been right, still, as the treasurer of the county of Santa Clara, with money belonging to the State, to be paid into the State treasury, he occupied a different position, and was, as such treasurer, entitled to take the money to Sacramento, the capital of the State and official residence of the State treasurer. As county treasurer, it was his duty to safely keep the public funds in his custody, and, at

stated intervals, to settle with the comptroller, and to pay over in cash to the State treasurer the sum found to be due to the State. This duty presupposes the necessity of a visit in person at Sacramento, and the delivery there of the amount due the State, and the county treasurer is responsible personally, and upon his official bond, until the money is so paid.

The defendant, if within the purview of the act of April 4, 1864—and under the allegations of the complaint, which are to be taken as true, we shall so regard it—was bound, in consideration of certain obligations assumed by the State of California, and of certain privileges extended to it, to "transport and convey over their said railroad all public messengers, convicts going to the State prison, lunatics going to the State insane asylum, materials for the construction of the State capitol building, articles intended for public exhibition at the fairs of the State Agricultural Society, and in case of war, invasion, or insurrection, as well as at all other times, also transport and convey over their said railroad all troops and munitions of war belonging to the State of California, free of charge, and without any other compensation than as herein provided." St. 1863–64, p. 344. If plaintiff was entitled to a free passage, or to carry the money in question, under this law, it must have been because he was a public messenger.

A "messenger" is defined by Webster to be "one who bears a message or an errand; the bearer of a verbal or written communication, notice, or invitation from one person to another, or to a public body; an office servant." The term, by its fair import and significance, does not apply to a public officer, acting in on original capacity, in the discharge of duties imposed upon him by law; but presupposes a superior in authority, whose servant the messenger is, and whose mandate he executes, not as a deputy, with power to discriminate and judge, or to bind his superior, but as mere bearer and communicator of the will of his superior. If a county treasurer is to be treated as a public messenger, we see no good reason why legislators and State officers, having enjoined upon them duties requiring their presence at the State capital, may not, with equal propriety, be entitled to free conduct as "public messengers."

PLAINTIFF NOT A "PUBLIC MESSENGER."

Under the nineteenth section of the twelfth article of our State constitution, "no railroad or other transportation company shall grant free passes, or passes or tickets at a discount, to any person holding an office of honor, trust, or profit in this State; and the acceptance of any such pass or ticket by a member of the legislature or any public officer other than railroad commissioner shall work a forfeiture of his office." We do not think the term "public messenger," as used in the act in question, applied to or conferred any rights upon the plaintiff as county treasurer of the county of Santa Clara.

It only remains to inquire whether or not defendant, as a common carrier, was derelict in duty in refusing to permit plaintiff, upon offer of compensation therefor, to carry his money in the baggage car as freight—he retaining the custody thereof; such car being used by Wells, Fargo & Co. as a receptacle for its express matter by consent of the defendant. Defendant was, at the date of the alleged refusal, according to the averments of the complaint, "engaged in and carrying on the business of a common carrier of passengers and freight for hire, by cars," etc., "over its railroad." "A common carrier must, if able to do so, accept and carry whatever is offered to him, at a reasonable time and place, of a kind that he undertakes or is accustomed to carry." Civil Code, § 2169. "A common carrier must not give preference, in time, price, or otherwise, to one person over another," etc. Civil Code, § 2170.

DEFENDANT NOT BOUND TO CARRY MONEY FOR FREIGHT.

A common carrier of goods is not under obligation to accept any and carry all personal property that may be offered. That class of carriers known as "transfer companies," engaged in receiving and transferring the baggage of passengers to and from public conveyances, by land and water, are under no obligation to accept and carry ordinary merchandise. A parcel delivery express company need not receive and deliver hay, lumber, or other articles too bulky, heavy, or otherwise inconvenient to handle and transfer by its usual facilities. In other words, the duty of the carrier is confined, as is provided by our Code, to accepting and carrying property "of a kind that he undertakes or is accustomed to carry."

The defendant did not undertake—that is to say, did not promise or agree—to carry defendant's money. Indeed, it was not asked to do so, except to permit the plaintiff to retain charge of and carry it in the car; and there is nothing in the complaint showing, or tending to show, that defendant was accustomed to carry, or ever did carry, or offer to carry, money as freight or baggage. On the contrary, the express averments of the complaint are to the effect "that the defendant has always refused to receive money as freight for transportation" over this route, or to allow any person to travel and carry money on its freight cars, or to check and carry money as baggage on its passenger cars.

The problem is therefore practically narrowed to a consideration of this question: Defendant had accorded to Wells, Fargo & Co. the privilege of carrying in its baggage car property of the same kind with that possessed by the plaintiff, and of retaining possession thereof while in transit. Under the circumstances presented by the complaint, was it the duty of defendant to extend like facilities to the plaintiff?

The express business, as understood and carried on in the United States, is said to have been inaugurated by Alvin Adams in the

year 1839. It at first involved the carriage of small packages of value between important cities; and, proving convenient to the public and remunerative to those engaged in the business, it gradually expanded in volume and importance, until upon all the great thoroughfares of the country, whether by land or water, one or more companies was to be found engaged in the receipt, carriage, and delivery of property, varied in character, and including that of great value in small compass, articles requiring special care to protect them from injury or theft, perishable goods requiring speedy transit and immediate delivery, and a variety of others, all known as "express matter." The business has continued to increase until it has become a prime factor in satisfying the wants of advancing civilization, and has demanded and received from transportation companies the facilities essential to its importance and successful execution. Among these are the allotment of express cars, and space in baggage cars attached to passenger trains, for the speedy transportation of this class of freight by railroad companies, and the transportation of messengers, the employees of the express companies, in whose custody and possession the property is retained during transit. The duties of railroad carriers are confined to the receipt, carriage, and delivery of such freights as are appropriate to such a mode of transportation; and, in the absence of some special provision in their charter, or in the law under which they are organized, railroad companies are not bound, as carriers of property, to receive and carry money, gold or silver bullion, bonds, bank-notes, jewelry, valuable papers, or other property not appropriate to the mode of transportation in vogue by such companies. Southern Exp. Co. *v.* Nashville, etc., R. Co., 20 Amer. Law Reg. 596; s. c. 2 Fed. Rep. 465.

DEFENDANT NOT BOUND TO EXTEND EXPRESS FACILITIES TO PLAINTIFF.

Doubtless the growth and expansion of the express business is largely due to the fact that its successful conduct calls for the exercise of powers, and furnishing of facilities, not possessed in any ample degree by railroad carriers. Be this as it may, the express business, as was said in Southern Exp. Co. *v.* Nashville, etc., R. Co., 20 Amer. Law Reg. 598, "is only second in importance to railroad transportation; and that the express business has so interwoven itself into the present methods that it cannot be dispensed with without producing an abrupt and disastrous revulsion in the present mode of carrying on trade. It has grown into immense proportions, and has become a necessity. . . . It has attained its present enlarged usefulness under the fostering care of the railroads themselves. . . . The right of the public to have quick, reliable, and safe carriage of goods, through expressmen, has been recognized for forty years. This general recognition by the public, and by railroad corporations, in connection with its admitted utility, stamps it as a legitimate mode of railroad carriage."

The carriage of such freights for express companies is demanded by the wants of the public, and is in the strict line of railroad duty.

An application of the principle which involves the duty of railroad companies to avail themselves of the discoveries of modern science and skill for the safe and speedy transportation of passengers and freight may well require them to so adjust their facilities for accommodating the public that its advancing wants may be supplied, and the mutual interests of all parties may be subserved.

The defendant has recognized and discharged this duty so far as to accord to Wells, Fargo & Co. all necessary facilities for conducting an express business over its railroad. Having thus provided for the accommodation of the public with express facilities, the contention of defendant is that the full measure of its duty is discharged, and that to require it to extend to each individual who may apply, and be willing to pay therefor, like facilities, would, owing to the peculiar requirements demanded, be subversive of legitimate trade, impose upon defendant burdens not easily borne, and in nowise benefit individuals demanding such privileges.

It does not appear from the complaint that the sum charged by Wells, Fargo & Co. for the transportation of his money was in excess of the value of the service rendered, or in excess of the sum which might reasonably have been exacted from him by defendant had it permitted him to retain possession of his money, and to travel with it in the baggage car devoted in part to express matter. If, therefore, plaintiff has been injured and damnified, it must be upon the principle that he, in common with all other persons, had a right to possession of his property while in transit, and to all the privileges and facilities extended to the express company for the transportation of like property.

This question was involved in three cases recently presented to the Supreme Court of the United States, and decided by that tribunal, known as the "Express Cases," and severally entitled, St. Louis, I. M. & S. R. Co. *v.* Southern Exp. Co., Memphis & L. R. Co. *v.* Same, and Missouri K. & T. R. Co. *v.* Dinsmore, 23 Am. & Eng. R. R. Cas. 545. These causes were each brought by an express company against a railway company to compel the latter to afford it the same express facilities it had formerly enjoyed under a contract then abrogated. The several circuit courts from which the cases were appealed had each entered a decree in favor ef the express companies, in which it was held, among other things:

"EXPRESS CASES" EXAMINED.

"(1.) That the express business . . . is a branch of the carrying trade that has, by the necessities of commerce and the usages of those engaged in transportation, become known and recognized so as to require the court to take notice of the same as distinct from

the ordinary transportation of the large mass of freight usually carried on steamboats and railroads.

"(2.) That it has become the law and usage, and is one of the necessities, of the express business that the property confided to an express company for transportation should be kept, while in transit, in the immediate charge of the messenger or agent of such express company.

"(3.) That to refuse permission to such messenger or agent to accompany such property on the steamboats or railroads on which it is to be carried, and to deny to him the right to the custody of the property while so carried would be destructive of the express business, and of the rights which the public have to the use of such steamboats and railroads for the transportation of such property so under the control of such messengers or agents."

"(7.) That it is the duty of the defendant to afford to the plaintiff all express facilities, and to the same extent and upon the same terms, that said defendant may accord to itself, or to any other company or corporation engaged in the conduct of an express business on the defendant's lines, and to afford the same facilities to the plaintiff on all its passenger trains."

The Supreme Court, in the opinion delivered by Chief Justice Waite, reviews the growth and importance of the express business; recognizes the fact that it could not be destroyed without interfering materially with business and the conveniences of social life; refers to the fact that railway companies recognize the right of the public to demand transportation facilities, by the railways which the public has permitted to be created, of that class of freight known as "express matter;" and then proceeds to show the inconveniences that would follow were the railroad companies obliged to furnish express facilities to all applying for them, its interference with passenger traffic, and concludes that "the railroad company performs its whole duty to the public at large, and to each individual, when it affords the public all reasonable express accommodation. If this is done, the railroad company owes no duty to the public as to the particular agencies it shall select for that purpose. The public require the carriage, but the company may choose its own appropriate means of carriage, always provided they are such as to insure reasonable promptness and security." And holds that in the absence of a usage to that effect, or of some statute requiring them so to do, it is not the duty of railroad companies to furnish express facilities to all alike who demand them.

The inconveniences which would follow from requiring railroad companies to extend equal express facilities to all persons, companies, and corporations regularly engaged in the express business, would be multiplied beyond measure were they, either with or without previous notice, required to furnish like accommoda-

tions to each individual who might at any time, and for a single trip, see fit to demand them.

Railroad companies owe important duties to the public, the discharge of which, in their letter and spirit, should be rigorously enforced by every department of the government to which authority in the premises is delegated; but to uphold the claim of plaintiff would establish a principle onerous to railroad companies, and at the same time detrimental to the speedy and orderly conduct of a branch of the carrying trade in which the public is most concerned.

We are of opinion the demurrer to plaintiff's complaint was properly sustained, and that the judgment should be affirmed.

We concur: FOOTE, C., BELCHER, C. C.

By the court: For the reasons given in the foregoing opinion the judgment is affirmed.

Passenger Carrying Money as Baggage may be Compelled to Pay Freight.—The case of Hutchings & Co. *v.* Western & Atlantic R. Co., 25 Ga. 61, although not analogous to the principal case, presents facts somewhat similar. In that case, one of the plaintiffs, Hutchings, took passage as a passenger on defendant's road, having paid the usual price for a passenger ticket. He took with him into the car a carpet-bag containing about $87,000 in gold, silver, ore, bullion, bills, notes and drafts, and which he kept in his possession and under his control. Upon his arrival at Atlanta, the defendant demanded and claimed freight to the amount of forty dollars on the said carpet-bag and contents. Upon Hutchings' refusal to pay the same, the defendant took possesion of the bag, and detained it for four days. After the expiration of the four days and upon the payment by plaintiff of $17, as freight upon the bag, the defendant delivered it to Hutchings. In an action in which the plaintiff claimed damages on account of said seizure and detention, the court, after holding that the money was not baggage, and the plaintiff was not entitled to have it carried as such, say: "The declaration shows that this road had published rates for the transportation of gold, and that the sum demanded for freights was upon these. It is unnecessary to determine whether the plaintiffs were bound to pay according to the published rates. It is certain that they were bound to pay what is customary and reasonable in such cases. It is true that, under the circumstances of this case, the plaintiffs may not have been entitled to recover from the defendants if they had lost the money. But not because the State was not liable to pay for losses sustained by travellers on the road, but because the owners were guilty of fraud, by concealing the fact that their bags contained a large sum of money. Gibson *v.* Peyton *et al.*, 4 Burr 2300; Batson *v.* Denovah, 6 Eng. Com. Rep. 333."

What does and what does not Constitute Baggage.—See Texas, etc., R. Co. *v.* Ferguson, 9 Am. & Eng. R. R. Cas. 395; Texas, etc., R. Co. *v.* Capps and note, 16 Ib. 118–121; Denver, etc., R. Co. *v.* Roberts, 18 Ib. 627; Anderson *v.* Wabash, etc., R. Co., 18 Ib. 377; Lake Shore, etc., R. Co. *v.* Warren, 21 Ib. 286; Kansas City, etc., R. Co. *v.* Morrison and note, 23 Ib. 481–486.

Liability of Company for Money Shipped as Baggage.—See note to Missouri Pac. R. Co. *v.* York, 18 Am. & Eng. R. R. Cas. 627.

ATCHISON, TOPEKA AND SANTA FÉ R. Co.

v.

ROACH.

(*Advance Case. November* 5, 1886.)

While a railroad company cannot be compelled to transport beyond its *termini*, it is well settled that it may lawfully contract to carry passengers and property, over its own and other lines, to a destination beyond its route, and when such a contract is made it assumes all the obligations of a carrier over the connecting lines as well as its own.

The sale of a through ticket, for a single fare, by a railroad company, to a point on a connecting line, together with the checking of the baggage through to the destination, is evidence tending to show an undertaking to carry the passenger and baggage the whole distance, and which, in the absence of other conditions or limitations, and of all other circumstances, will make such carrier liable for faithful performance, and for all loss on connecting lines, the same as on its own.

Each carrier is liable for the result of its own negligence, and, although the first carrier may have assumed the responsibility for the transportation to a point beyond its own route, any of the subsequent or connecting lines, to whose negligence the loss or injury can be traced, will also be liable to the owner.

The sale of a through ticket over the route formed by the connecting lines of several railroad companies, and the checking of baggage to the end of the route, without other evidence of the relations between the companies, or the basis upon which through business was done by them, fails to show such a community of interest as would make them partners *inter sese*, or as to third persons; nor will such action alone make the last carrier liable for the negligence of the contracting carrier, or of any other carrier in the combination.

ERROR from Reno county.

Geo. R. Peck, *A. A. Hurd* and *W. C. Campbell* for plaintiff in error.

R. A. Campbell and *H. Whiteside* for defendant in error.

JOHNSTON, J.—This action was brought by Michael Roach against the Atchison, Topeka & Santa Fé R. Co. to recover for baggage alleged to have been lost and injured while in transit from New York City to Hutchinson, Kansas. A verdict was given in favor of Roach for $227.32, and judgment rendered accordingly. The railroad company brings the case here, and complains of the charge of the court, and of the insufficiency of the evidence. FACTS.

The essential facts of the case may be briefly stated. On February 28, 1881, Roach purchased eight coupon tickets for the passage of himself and family from the city of New York to Hutchinson,

Kansas, over the New York, Lake Erie & Western Railroad; Grand Trunk Railway, Michigan Central Railroad; Chicago, Burlington & Quincy Railroad; Hannibal & St. Joe Railroad, and Atchison, Topeka & Santa Fé Railroad. The tickets were purchased from one Henry Opperman, who had an office in New York, and who, at the same time, caused several pieces of baggage to be checked through to Hutchinson, using checks on which the names of the roads mentioned were stamped. As there was more baggage than could be carried on the tickets purchased, Roach was required to and did pay $62.15 for extra baggage, and Opperman gave him duplicates of the checks, which he retained. The defendant in error and his family made the journey over the roads mentioned, and the tickets were honored and accepted for their passage, and the servants of the several companies detached the coupons or portions of the ticket that represented the passage money over the different roads. When the passengers reached Hutchinson, application was made for the baggage, and it was found that some of it had been lost, and portions of it badly injured. The testimony tended to show that the baggage was delivered to the first carrier in good condition, but on what road or roads the loss or injury occurred was not shown.

The plaintiff below sought to recover upon two theories: One, that Opperman, who sold the tickets, was the agent of the Atchison, Topeka & Santa Fé R. Co., and that that company undertook to carry the passengers and baggage over the entire route; and that, being the contracting carrier, it was liable for the loss and injury, regardless of where and upon what road it occurred. The other theory is that the several roads constitute a connected and united line, and that the combination and running arrangements existing among the owners of the roads were such as amounted, in effect, to a partnership; and therefore the injury and loss was a common liability, and each and all of the companies are liable, no matter upon what part of the line the loss occurred.

No recovery can be had upon the first theory, for the reason that the testimony wholly fails to establish that Opperman was the agent of the defendant company. Some of the witnesses for Roach spoke of Opperman as the agent of that company, while others stated that he was the agent of the New York, Lake Erie & Western R. Co. It was, however, developed, upon cross-examination, that they had no knowledge of his authority or agency, beyond his action in the sale of the tickets and the checking of the baggage. Opperman testified that he was the authorized agent of the New York, Lake Erie & Western R. Co., and sold the tickets for, and as the agent of, that company; and that he did not represent, and was not the agent of, the defendant company. There was other testimony to the same effect; and also that when Roach purchased his tickets

OPPERMAN NOT THE AGENT OF DEFENDANT COMPANY.

the defendant company had no tickets on sale in or about the city of New York.

The theory that the defendant company was the original contracting carrier finds no support in the testimony, and no liability arises against the company on that ground. Where, then, is the liability? It is contended by the railroad company that the New York, Lake Erie & Western R. Co., being the first carrier, is alone liable. While a railroad company cannot be compelled to transport to a point beyond its own line, it is well settled that it may lawfully contract to carry persens and property, over its own and other lines, to a destination beyond its own route; and, when such a contract is made, it assumes all the obligations of a carrier over the connecting lines as well as it own. In such cases the connecting carriers engaged in completing the carriage are deemed to be agents of the first carrier, for whose negligence and default the contracting carrier becomes liable. Berg *v.* Atchison, T. & S. F. R. Co., 30 Kan. 561; s. c. 16 Am. & Eng. R. R. Cas. 229; Lawson, Carr. § 235; Hutch. Carr. § 145; Thomp. Carr. 431; 2 Rorer, R. R. 1234.

FIRST COMPANY ASSUMES OBLIGATIONS OF CARRIER OVER CONNECTING LINES.

Of course, a railroad company, or other common carrier, may limit its liability to the loss or injury occurring on its own line, and the understanding or contract between the parties is to be determined from the facts of each case. Some of the courts have held that the mere acceptance of the property marked for transportation to a place beyond the terminus of the road of the accepting carrier amounts to an undertaking to carry to the ultimate destination, wherever that may be, and, in the absence of any conditions or limitations to the contrary, will make it liable for loss occurring upon connecting lines as well as its own; while others hold that in such a case the carrier is only bound to safely carry to the end of its own route, and there to deliver to the connecting carrier for the completion of the carriage. Lawson, Carr. §§ 238–240. But where a railroad company sells a through ticket, for a single fare, over its own and other roads, and checks the baggage of the passenger over the entire route, more is implied, it seems to us, than in the mere acceptance of the property marked for a destination beyond the terminus of its own line. The sale of a through ticket, and the checking of the baggage for the whole distance, is some evidence of an undertaking to carry the passenger and baggage to the end of the journey. The contract need not be an express one, but may arise by implication, and may be established by circumstances, the same as other contracts. In Wisconsin a passenger purchased a through ticket from the Chicago & Milwaukee R. Co. from Milwaukee to New York City, and at the same time delivered her trunk to that company, and received therefor a through check to New York City. Upon arrival at New York, the trunk was found to have been opened and some of the

EFFECT OF SELLING THROUGH TICKET.

articles taken therefrom. The Supreme Court, in ruling upon the effect of the railway company issuing the through ticket and check, stated that "the ticket and check given by the Chicago & Milwaukee R. Co. implied a special undertaking by that company to safely transport and carry, or cause to be safely transported and carried, the plaintiff and her baggage over the roads mentioned in the complaint, from Milwaukee to the city of New York. This, we think, must, in legal contemplation, be the nature and extent of the contract entered into and assumed by that company when it sold the plaintiff the through ticket, and gave a through check for the trunk, and received the fare for the entire route." Candee *v.* Pennsylvania R. Co., 21 Wis. 589; Illinois Cent. R. Co. *v.* Copeland, 24 Ill. 332; Carter *v.* Peck, 4 Sneed, 203; Railroad Co. v. Weaver, 9 Lea, 38; Baltimore & O. R. Co. *v.* Campbell, 36 Ohio St. 647; s. c., 3 Am. & Eng. R. R. Cas. 246; 2 Rorer, R. R. 1001.

From the authorities, we conclude that the sale of a through ticket, for a single fare, by a railroad company, to a point on a connecting line, together with the checking of the baggage through to the destination, is evidence tending to show an undertaking to carry the passenger and baggage the whole distance, and which, in the absence of other conditions or limitations, and of all other circumstances, will make such carrier liable for faithful performance, and for all loss on connecting lines, the same as on its own. The liability of the first carrier does not necessarily relieve the defendant company from responsibility. Each carrier is liable for the result of its own negligence; and although the first carrier may have assumed the responsibility for the transportation to a point beyond its own route, any of the subsequent or connecting carriers to whose default it can be traced will be liable to the owner for the loss of his baggage. Hutch. Carr. § 715; Aigen *v.* Boston & M. R. Co., 132 Mass. 423; s. c., 6 Am. & Eng. R. R. Cas. 426; Railroad Co. *v.* Weaver, 9 Lea, 39.

The defendant company cannot, however, be held liable upon that ground, because there is no evidence that the baggage was injured or lost while in the custody of that company, nor was it in fact shown upon what part of the route the injury or loss occurred.

The other theory upon which a recovery is sought is that the several connecting lines over which the baggage was to be carried should be treated as a continuous and united line, and that the arrangements made by the several lines for through traffic was such as to constitute them a partnership. There is a singular lack of testimony in the case, not only respecting the terms of the contract with the passenger, but also in regard to the relations existing among the several carriers. Not a word of testimony was introduced as to the running arrangements between the companies, nor the basis upon which through business was done. The practice or custom of the compa-

WHETHER ARRANGEMENTS FOR THROUGH TRAFFIC CONSTITUTE PARTNERSHIP.

nies in the past was not shown, neither was there any proof that they had ever co-operated, or had done any through business, beyond the transaction in question. It was not even shown what the form of the tickets was, nor what were the stipulations, if any, printed on them. There was, in fact, no evidence upon which to predicate a theory of partnership, or that each of the companies was the agent of all the others, except the single transaction of selling the tickets and checking the baggage. It is doubtless true that arrangements are frequently made among railroad companies, whose lines connect, for through traffic, which constitute them partners. Such an arrangement is greatly to the advantage of the companies. The convenience which it affords the public invites business, and swells the traffic of the companies engaged in the joint enterprise. These arrangements, among associated lines, render it difficult for the passenger or shipper, in case of loss or injury of his property, to ascertain where the loss occurred. But no such difficulty lies in the way of the railroad companies. They have the facilities, and can easily trace the property to the company which caused the injury or loss. In interpreting the agreements and conduct of associated lines, engaged in a through traffic, public policy, and the inconvenience mentioned, should be considered, and they should be fairly and liberally interpreted towards the patrons of the lines, holding the companies, where it is admissible, under the rules of law, to a common liability as partners. But such arrangements for through traffic cannot be held to be a partnership unless there is a community of interest among the companies, and under which each shares the profits and losses of the enterprise. The mere sale of a through coupon ticket over the connecting lines of several companies, and the checking of the baggage to the end of the route, does not show such a community of interest as would make them partners *inter sese*, or as to third persons. This question has been directly adjudged.

A through ticket was purchased for passage from New York to Washington over three lines of railroad which constituted a through line for the transportation of passengers and freight, and the passenger purchasing the ticket received a through check for her baggage. It appeared that the fare received for through tickets was accounted for by the company selling the tickets to the other lines according to certain established rates, but there was no division of losses; and it was held, in an action against the last carrier to recover for lost baggage, that the first carrier was liable for losses occurring on its own line, as well as any other connecting line throughout the whole distance, but that the arrangement of the three companies for the sale of through tickets, and the issuance of through checks, while it resembled a partnership, did not constitute one, nor make any of the connect- SAME—AUTHORITIES.

ing carriers liable for a loss not occurring on its own line. Croft *v.* Baltimore & O. R. Co., 1 McArthur, 492.

In Hartan *v.* Eastern R. Co., 114 Mass. 44, it was ruled that arrangements between connecting roads forming a continuous line, for the sale of through coupon tickets, which enabled passengers to pass over all the roads without change of cars, did not imply joint interest or joint liability.

In another case, where several carriers whose lines connected made an agreement among themselves to appoint a common agent at each end of a continuous line to sell through tickets and receive fare, it was held that this arrangement did not constitute them partners as to passengers who purchased through tickets, so as render each of the companies liable for losses occurring on any portion of the line. Ellsworth *v.* Tartt, 26 Ala. 733.

A somewhat similar case was decided in New York. There a passenger purchased a through ticket from New York to Montreal, over several connecting lines of railroad, owned by several companies. The ticket was a strip of paper divided into coupons, whereof one was to be detached and surrendered to the conductor of each line on the route. The passenger, instead of giving his valise into the charge of the agent of the company, and receiving a check therefor, kept it in his own charge to the terminus of the line of the first carrier, where he delivered it to the agent of the connecting line, who checked it through to another point on the road. It appeared that an arrangement had been entered into between the various lines from New York to Montreal to connect regularly. Tickets were sold in New York for the entire route, or intermediate places, under the direction of a general agent, who was paid by the several companies. The rate of fare was different on the different roads, and each company received its own proportion of the whole fare or passage money at the close or at the beginning of every month, according to the established rates of fare. It was held that there was nothing in an arrangement like this to constitute the different companies partners for the transportation of passengers or baggage, so as to make one of them liable in common with the others for the loss of the valise. It was decided that "the arrangement may be beneficial to them as well as to the public, inasmuch as, by facilitating travel, it may tend to increase it; but that would not create that joint interest—that community in profit and loss—which is essential to the existence of a partnership." Straiton *v.* New York & N. H. R. Co., 2 E. D. Smith, 184; Hot Springs R. Co. *v.* Trippe, 42 Ark. 465; s. c., 18 Am. & Eng. R. R. Cas. 562; Aigen *v.* Boston & M. R. Co., 132 Mass. 423; s. c., 6 Am. & Eng. R. R. Cas. 426; Darling *v.* Boston & W. R. Co., 11 Allen, 295; Kessler *v.* Railroad Co., 61 N. Y. 538; Irwin *v.* Railroad Co., 92 Ill. 103; Insurance Co. *v.* Railroad Co., 104 U. S. 146; s. c., 3 Am. & Eng. R. R. Cas. 260.

Among the cases relied on by the defendant in error is Hart *v.* Railroad Co., 8 N. Y. 37. In that case the defendant, which was one of three railroad companies owning distinct portions of a continuous road, was held liable for the loss of the baggage of a passenger received at one terminus to be carried over the whole road. The liability was not, however, based alone upon the selling of the ticket and the checking of the baggage. In addition to through tickets, it appeared that, under the agreement made, each of the railroad companies ran its cars over the whole route, and employed the same agents to sell passage tickets. Besides these facts, it appeared that the lost baggage had been placed directly in charge of the servants of the defendant company, and that its loss was due in part to the negligence of that company.

Texas & P. R. Co. *v.* Fort, a decision by the commission of appeals of the State of Texas, reported in 9 Am. & Eng. R. R. Cas. 392, is also relied on. There it is held that the delivery of through checks, upon which were stamped letters indicating the different railways over which the baggage would go, constituted a contract under which the several companies were liable, regardless of the line upon which the loss occurred—a proposition to which we cannot accede. The decision in this case is based upon the ruling in Hart *v.* Railway Co., *supra*, which, as we have seen, was determined upon other considerations.

The same may also be said respecting Texas & P. R. Co. *v.* Ferguson, another decision of the commission of appeals of Texas, 9 Am. & Eng. R. R. Cas. 395, as well as Harp *v.* The Grand Era, 1 Woods, 184.

The only other case relied on is Wolff *v.* Central R. Co., 68 Ga. 653. It was there held that where a passenger, with a through ticket over a connecting line, checks his baggage at the starting point through to his destination, and, upon arrival there, found that it had been injured, he might sue the railroad company which issued the check, or the one delivering the baggage in bad order. Upon the facts in that case the court determined that the company selling the tickets was to be regarded as the agent of the other companies composing the line, and intimated that, where a passenger travels over a continuous line on a through ticket, and the baggage is sent on a through check, that any one of the companies may be held liable for spoliation of the baggage, irrespective of the point at which it actually occurred, and the query is also raised as to whether they are jointly liable as partners. The writer of the opinion held that by the sale of the tickets, and the division of the receipts at periodical settlements, they acted as principals, and not as agents, and that by such action they stood substantially in the position of partners in the through business, and were jointly and severally liable as such. The concurrence of the other justices was, however, placed upon the ground that as the last carrier, and the

one which was sued, received the baggage in apparent good condition, it was presumably liable; and the chief justice stated that this was the exact point decided. It is difficult in many cases to determine whether the arrangements and agreements of connecting carriers are such as to constitute each of them principals, or to place them in the relation of partners; but neither upon reason nor authority can we hold that the sale of through tickets, and the checking of baggage over the connected lines of several companies, without other proof of their relations, or the basis upon which the business was done, is sufficient to make them jointly and severally liable as partners.

The instructions of the court not being in accord with the views herein expressed, and the evidence being insufficient to support the verdict, the judgment of the district court must therefore be reversed and the cause remanded for another trial.

(All the justices concurring.)

Liability of Connecting Lines of Carriers for Loss of Baggage.—See, generally, B. & O. R. Co. *v.* Campbell, 3 Am. & Eng. R. R. Cas. 246; Wolff *v.* Central R. Co., 6 Ib. 441; Texas, etc., R. Co. *v.* Fort, 9 Ib. 392; Texas, etc., R. Co. *v.* Ferguson, 9 Ib. 395; Isaacson *v.* N. Y., etc., R. Co., 16 Ib. 188.

FELDER

v.

COLUMBIA AND GREENVILLE R. CO.

(21 *South Carolina*, 35.)

The complaint alleged that plaintiff purchased at A a through ticket to C, over railroad lines E and F, and on the route lost her trunk, for which she demanded damages of F. *Held*, that in failing to allege that E and F were joint contractors, or that the trunk had been received by F, the complaint did not state facts sufficient to constitute a cause of action.

The sale of a through ticket over two or more connecting lines of railroad is not evidence of a joint contract between such roads whereby one should become responsible for the default of another.

In action against a railroad company for the value of a trunk lost on a connecting line before it reached the defendant's road, a nonsuit was properly ordered, there being no evidence of a joint contract between the two railroads.

This case distinguished from Bradford *v.* South Carolina R. Co., 7 Rich. 201.

Mr. JUSTICE MCGOWAN concurred in the result.

Before HUDSON, J., Richland.

This was an action by Marion H. Felder against the Columbia & Greenville R. Co. The opinion states the case.

Andrew Crawford for appellant.
Pope & Haskell contra.

The opinion of the court was delivered by McIver, J. The plaintiff brings this action to recover damages for the loss of her trunk and its contents while travelling over a line of connecting railroads, of which the defendant is one, from Atlanta, Georgia, to Columbia, South Carolina. The material allegations of her complaint are as follows: "That during the month of December, 1881, and on or about the twenty-seventh day thereof, she was a passenger on board of a train which left Atlanta that day over the Atlanta & Charlotte Air Line R., she having purchased a ticket from that point to Columbia, South Carolina, by way of the Atlanta & Charlotte Air Line R. over the Columbia & Greenville R." Next follows an allegation "that while travelling over the lines of road and along the route provided by the terms of her ticket, at the time indicated in the foregoing paragraph, the said railroad officials took charge of this plaintiff's baggage, to wit, a sole-leather trunk, . . which said trunk from that time has never been restored to the owner thereof, although repeated demands have been made for its restoration." And finally it is alleged, "That although this plaintiff and her baggage were carried for hire, yet these defendants, not regarding their duty, did not use proper care therein, but by the negligence and improper conduct of their servants said trunk and contents were wholly lost, to the damage of the plaintiff eight hundred dollars." Facts.

For a defence to this action the defendant insists, first, that the complaint does not state facts sufficient to constitute a cause of action against this defendant; second, upon a general denial of the allegations of the complaint above set forth; third, that defendant never undertook to carry and deliver the trunk alleged to have been lost, and that the same had never been delivered to or received by defendant.

The testimony adduced on the part of the plaintiff is fully set out in the "Case," and was to the effect that the plaintiff, by her agent, bought a through ticket from Atlanta to Columbia; that the baggage master in Atlanta was requested to check the trunk in question, along with other baggage belonging to the party with whom the plaintiff was travelling, to Columbia, who replied that he had no through checks, but that it was all right, and they would go through to Columbia all right, and wrote something on the trunks; that the trunk in question was first missed at Seneca City, and has not been seen since, the witness saying, "To the best of my knowledge it was not put on the Columbia and Greenville train;" that there was a connection of roads from Atlanta to Columbia by way of the Atlanta & Charlotte Air Line R. over the Columbia & Greenville R. during the time of the alleged loss of the trunk; that

through tickets were sold over this route from Atlanta to Columbia, and *vice versa;* that the several roads of the line received compensation from the gross amount for which the through ticket sold according to the number of miles travelled on each of the roads; that there was an arrangement existing among these roads composing this line of travel having in view the diverting of travel from other lines which stretched out from Atlanta to the same point; that A. Pope was the general passenger agent of this line of roads, and had very large powers in relation to matters of passenger travel and their baggage; that he had authority to bind the roads in matters relating to his department, but could not override the authority of the presidents of the several roads, under whose authority he made the rates of transportation at important points; that said A. Pope, in replying to a letter of plaintiff's counsel, stated that a search for the missing trunk was being conducted under the direction of the general baggage agent, and that "if a liability is established upon either one of the roads at interest, viz., the A. & C. A. L. R. or G. &. C. R., a properly audited claim for the value of the trunk will be promptly paid."

At the conclusion of this testimony on behalf of the plaintiff, a nonsuit was moved for and granted, upon the ground that "there was a total failure to prove any liability of the defendant company, as the loss had been proved to have occurred before defendant's line was reached, and that there was no evidence of any contract by which defendant could be held liable for loss of baggage on other lines."

The plaintiff appeals upon the following grounds: "1. That the railroads constituting the line, viz., the Atlanta & Charlotte Air Line and the Columbia & Greenville Railroads, were joint contractors for the carriage and delivery of passengers and their baggage, and as such responsible for the loss of the latter. 2. That it was proper practice to sue the Columbia & Greenville R. Co. for the loss as proved in this action, they being one of the contractors. 3. That there was abundance of testimony in the cause sustaining the foregoing exceptions which should have been submitted to the jury for them to pass upon." The remaining ground of appeal having been abandoned, need not be stated.

GROUNDS OF APPEAL.

It is quite clear that the circuit judge was entirely right in holding that there was an entire failure to prove any independent liability on the part of the defendant company, for there was not only no testimony tending to show that the missing trunk had ever been delivered to or received by defendant, but the plaintiff's own witness testified that the trunk was missed at Seneca City, before reaching defendant's line, and that to the best of his knowledge it was not put on the Columbia & Greenville train. The correctness of this seems

NO INDEPENDENT LIABILITY ON PART OF DEFENDANT COMPANY.

to be recognized by the appellant, for in her exceptions the only point she makes is that the defendant was a joint contractor with the Atlanta & Charlotte Air Line R., to whom the trunk was delivered, and as such liable for the negligence of that company; or at least that there was sufficient evidence of such joint contract to require that the question should have been submitted to the jury.

The first and fundamental difficulty in the way of the plaintiff seems to us to be this, that there was no allegation in her complaint of any such joint contract, and no allegation that the trunk in question was ever delivered to or received by the defendant company, and hence the complaint failed to state facts sufficient to constitute a cause of action against this defendant, and for that reason should have been dismissed. But even assuming that the complaint did contain such allegations, we think that there was an utter lack of evidence to sustain either allegation. As we have already said, there was not only no evidence to sustain the last mentioned allegation, but the testimony distinctly disproved it. So that the only inquiry is whether there was any evidence tending to show a joint contract between these railroad companies whereby the one should become responsible for the default of the other. We have looked in vain through the testimony for any such evidence.

Surely, the fact that through tickets were sold from Atlanta to Columbia and from Columbia to Atlanta affords no such evidence. Through tickets are oftentimes intended as much, if not more, for the convenience and advantage of the travelling public as for that of the railroads over which they are sold; and if the principle should be established that the sale of through tickets over a line of connecting railroads constituted evidence of a joint contract between such roads whereby one would become responsible for the defaults of another, the effect would doubtless prove very injurious to the interests and convenience of the travelling public. For if such were the rule, railroad companies would not be very likely to make these arrangements so conducive to the comfort and convenience of passengers, as the effect would be to make each of the companies composing the line, no matter how long it might be, guarantors of the conduct of each of the other companies. A passenger buying a through ticket from Columbia or New Orleans to New York, and sustaining some loss or damage somewhere along the route, might bring his action against the richest, best equipped and most carefully managed railroad constituting a portion of the line, and recover damages from it, when in fact his loss or damage was sustained while travelling over a link in the line owned by a totally insolvent corporation, in bad order and carelessly managed.

EFFECT OF SALE OF THROUGH TICKET.

But we need not discuss the question, for we think that the

point has been distinctly ruled in the very case so much relied on by appellant, Bradford *v.* South Carolina R. Co., 7 Rich. 201. Nor do we think that there was anything in the other evidence adduced tending to show any such joint contract between these companies as would make one liable for the defaults of the other. All of the evidence is entirely consistent with the idea that the only arrangement between these companies was the usual one for the sale of through tickets, whereby passengers would be attracted to the line composed of these different railroads, for their own convenience, and none of it points to the assumption of any joint liability.

ARRANGEMENT EXISTING BETWEEN THE COMPANIES.

The case of Bradford *v.* South Carolina R. Co., *supra*, mainly relied upon by the appellant, differs materially from this case. In the first place, there was in that case a distinct allegation that the several companies composing the line from Chattanooga to Charleston were joint contractors, and the testimony principally, if not solely, relied upon by the court as sufficient to establish such joint contract was, not the through receipt which the courts said would not be sufficient to establish it, but the fact that the defendant company had published an advertisement, in which they announced to the public that "by a recent arrangement between the South Carolina, the Georgia, and Western & Atlantic Railroads, a through ticket for freight on cotton has been made from Chattanooga, Tenn., to Charleston, S. C., at the rate of sixty-five cents per 100 lbs. It is highly necessary, in order to insure correctness in the transaction of this business, that the agent of the South Carolina R. at Hamburg should be aware of the number of bales and marks of each shipment. Shippers are therefore earnestly requested to take duplicate receipts, one of which must, in all cases, be forwarded per mail to the above-mentioned agent, *in order to fix responsibilty on this company*. With these precautions, the business can and will be transacted mutually satisfactorily to all concerned. *The roads pledge themselves* to give all practicable dispatch to cotton intrusted to them for transportation."

BRADFORD CASE EXAMINED.

The words which we have italicised in the foregoing advertisement showed very clearly that there was a joint contract, and certainly the South Carolina R. Co., in the face of these words, could not deny it. The evidence showing that duplicate receipts had been forwarded to the agent at Hamburg, and thus the condition upon which the liability of the defendant company was to attach having been performed, that company could not deny it, even though the testimony seemed to show that the damage to the cotton in question was sustained before it reached the South Carolina R.; for that company had, by the terms of its advertisement, in effect, agreed that its responsibility should be fixed so soon as one of the duplicate receipts had been forwarded to its agent at Hamburg,

which was done. The court, therefore, properly held that the evidence was quite sufficient to require that the question as to whether there was a joint contract should be submitted to the jury. But in this case we find no such testimony, and we see no error on the part of the circuit judge in granting the nonsuit.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

Mr. Chief-Justice SIMPSON concurred generally, but Mr. Justice McGOWAN only in the result.

See Atchison, Topeka & Santa Fé R. Co. *v.* Roach, and note, *ante*, p. 257.

SAVANNAH, FLORIDA AND WESTERN R. Co.

v.

McINTOSH.

(73 *Georgia*, 582.)

Where a passenger purchased a through ticket over a line of railroads, having a coupon attached for each road, and checked his baggage through to his destination, if, upon his arrival, it was found to be lost, he could hold the last road of the line responsible therefor.

CITY COURT of Savannah.

McIntosh sued the Savannah, Florida & Western R. Co. for $861.95, on account of loss of a trunk. The facts were that plaintiff purchased from the agent of the Galveston, Houston & Henderson R., at Galveston, a through ticket to Savannah, having coupons for the various roads of the connecting line over which he had to pass. These coupons were torn off by the respective roads, and in such cases, the roads would settle with each other at stated intervals. Plaintiff's trunk was checked through to Savannah. On arriving there, it could not be found, and plaintiff sued defendant as the last of the line of roads over which he passed.

Defendant introduced testimony tending to show that it never received the trunk, and there was conflict as to the value of its contents.

The jury found for the plaintiff $711.95. Defendant moved for a new trial, which was refused, and it excepted.

Chisholm & Erwin for plaintiff in error.

Denmark & Adams for defendant.

JACKSON, C. J.—The question made here is, whether the last of a chain of railroads is liable to a passenger for his baggage, which

was checked through from Galveston to Savannah, the passenger having purchased at Galveston a through ticket with coupons for the several links of road making the chain.

LAST CARRIER OF CONNECTING LINES IS LIABLE FOR LOSS OF BAGGAGE.

It is not an open question in this court. In Hawley *v.* Screven *et al.*, receivers, 62 Ga. 347, it was held that the Atlantic & Gulf R. Co., of which defendants were receivers, being first of a chain of roads, was responsible, though it showed delivery of the baggage to the next connecting line. In Wolff *v.* Central R. Co., 68 Ga. 653; s. c. 6 Am. & Eng. R. R. Cas. 441, it was held that the Central R. Co. was responsible for baggage checked in New York to Macon, being the last link in the chain of roads, which is the identical case now made.

The principles ruled in these cases cover this; and the last case especially ought to be held law, for it is reason and sense. It is at the end of the line where the passenger has been landed that he needs his baggage. When Wolff got to Macon from New York, he wanted his baggage. He got a check for it in New York, thereby binding the combination of roads for money received there, part to be paid each, to put him and baggage off at Macon, and this court ruled that the last road of his trip, terminating at Macon, was liable. So McIntosh, at Galveston, made a similar contract, got a similar coupon ticket, and received a check for his baggage deliverable at Savannah. The plaintiff in error was the last road, just as the Central R. was in the case in 68 Ga., and it must pay for this baggage. It makes no difference to the passenger where the loss occurred—whether before or after he stepped aboard the plaintiff in error's cars. The check made it unnecessary for him to see that it was put on the baggage-car of plaintiff in error. Just as this court held in 62 Ga., *supra*, that though the first company showed it had transferred the baggage to the second, yet itself was still liable; so here, though this plaintiff in error might prove that the trunk was not delivered by transfer to it, yet it is liable. It was in contemplation of the contract and the portion of money it got under the contract at Galveston, by getting the coupon, the evidence of money on settlement with the combination, that it then received the trunk and became responsible for its safe delivery.

When it has paid McIntosh for the baggage, then let it reimburse itself out of that one of the links in the combination whose fault or negligence lost it. It is just, equitable, public policy, sound sense, and must be good law. At any rate, it is the law of Georgia ruled in the 62d and 68th reports, *supra*, and which we could not alter without reviewing those cases, if we would, and would not alter if we could. We see no error in the other points.

Judgment affirmed.

Liability of Last Carrier of Connecting Lines for Baggage Lost or Injured. —Where a passenger purchased in Chicago a "through ticket" for New York, consisting of four coupons to be separated and delivered upon demand, three of them at points between Chicago and Albany and the fourth after leaving the latter place; *held*, that the railroad company owning the last route of the journey, from Albany to New York, was liable for the loss of a trunk. McCormick *v.* Hudson River R. Co., 4 E. D. S. (N. Y.) 181.

In Lin *v.* Terre Haute, etc., R. Co., 10 Mo. App. 125, *held* that evidence that when delivered by the last carrier baggage was broken open and part of its contents missing is *prima facie* evidence that the loss occurred through the negligence or fraud of the last carrier.

Where a passenger with a through ticket over a connecting line of railways checks his baggage at the starting point through to his destination, and upon arrival it is damaged or has been broken open and robbed, he may sue the company delivering the baggage in bad order. Wolff *v.* Cent. R. Co., 68 Ga. 653 (6 Am. & Eng. R. R. Cas. 441).

The possession by a passenger of a baggage check is *prima facie* evidence that the company has the baggage. And on a change of passage from one railroad to another, if the agent of the road does not find the baggage which is checked he should give immediate notice to the owner, or the company owning the road on which the passenger embarks will be held liable. Davis *v.* Michigan Southern, etc., R. Co., 22 Ill. 278.

But see Wolff *v.* Cent. R. Co., 68 Ga. 653 (6 Am. & Eng. R. R. Cas. 441), where it was *held* that section 2084 of the Code providing that the last of a connecting line of railways over which goods are shipped, which receives them as in good order, is liable to the consignee, does not apply to baggage of a passenger checked and accompanying him on his passage.

See Atchison, T. & S. F. R. Co. *v.* Roach, and note, *ante*, p. 257; Felder *v.* Columbia & Greenville R. Co., *ante*, p. 264.

Vineburg

v.

Grand Trunk R. Co.

(13 *Ontario Appeal Reports*, 93.)

"It is the duty of a railway company to have baggage ready for delivery on the platform at the usual place of delivery, until the owner in the exercise of due diligence can call and receive it; and it is the owner's duty to call for and receive it within a reasonable time." Therefore, where a passenger on arriving at his destination deliberately refrained from applying for his baggage on being told by his cabman that he could not conveniently take it, and on sending for it, on the following morning, one of three trunks could not be found, *held*, in an action to recover the value of the trunk and the wearing apparel it was said to contain, that the liability of the railway company as common carriers had ceased [in this reversing the judgment of the court below] a nonsuit was ordered to be entered.

The only claim (if any) which the plaintiff, under the circumstances, had against the company was as warehousemen or bailees.

THIS was an action brought by Aaron Vineberg in the County Court of Stormont, Dundas, and Glengary, against the Grand Trunk R. Co. of Canada, seeking to recover from the defendants, as common carriers, $200 for damages by reason of the loss of a trunk alleged to have contained certain goods and chattels of the plaintiff, and which occurred in the manner hereinafter appearing.

The case came on for hearing before his Honor Judge Pringle, on the 12th June, 1885, when the plaintiff was examined on his own behalf, and in the course of his evidence stated that he was a pedler at the time of the loss (9th January, 1884), and in answer to a request that he would relate to the court and jury the circumstances connected with the loss of the trunk in question, said:

"I had three trunks when I started after New Year's. I came to Morrisburgh, and started for Iroquois driving. I took a horse. It was very stormy, and there was very deep snow. I met young Fraid coming into town. He asked me where I was going, and I asked where he was going, and he said he was going to Morrisburgh. I said, I do not intend to peddle any more, Albert. If you will do me the favor of taking this trunk to Morrisburgh, I guess I will go home. If you will check it to Cornwall I guess I will go home on Wednesday or Thursday; I will go home to Cornwall, I said (that is where my brother is living), and if you pass me I can get the check and get the trunk in Cornwall. So I left him and went to Iroquois. I went off the first night, and in a couple of days went over and stopped one night at a farmer's, and when at Iroquois I stopped at the Grand Trunk Hotel. The station master went down with me (it was near the station) and we checked about five o'clock or four o'clock, and the train was very late. I could not say how late, but the train was very late, I guess, when we started. It was night when he, young Fraid, handed to me the check. When I came to Cornwall, I got a little shawl to turn over my neck, and when I got there the man who drives the team, Jessmer, he took me for my brother. He said, 'Will you drive down?' I said, 'All right, I will drive down.' So looking out near the baggage I did not see any one, and it was very stormy. I went over and there was no one. So he said, 'Drive down.' He said, 'It is impossible to get it to-night.' I was looking, and he said, 'You will get it to-morrow morning if you cannot get it to-night.' I tried that night, but could not get it.

"Q. Did you see any baggageman round there that night, with a band on his hat? A. I know this gentleman with black whiskers. He has checked me over a hundred times. I got home and in the morning when I went out of my brother's place I met Rookey, his brother-in-law, and I said, 'Mr. Rookey, go down to the depot and get these three trunks,' and I handed him the checks, and when he came back he had only two.

"Q. Is this the check of the missing trunk now produced, num-

bered twenty-one thousand eight hundred and eleven (21,811)? A. Yes.

"You got no trunk for this check? A. Not for this. I got the other two."

The learned judge, at the suggestion of counsel on both sides, submitted several questions in writing (eighteen in all) to the jury, who, after an hour's consultation, returned with written answers to all save the 12th, which was: "Was any of the plaintiff's trunks stolen after their arrival at Cornwall; if so, from what place was it stolen or taken, and at what time?"—and to this no answer was given; and the jury returned a verdict for the plaintiff for the value of the wearing apparel and trunk, $120; and thereupon the court directed judgment to be entered for the plaintiff for that sum and costs.

The defendants subsequently obtained an order *nisi* to set this verdict and judgment aside, which on argument his honor refused to make absolute, observing in the course of his judgment in doing so that—

"On the defendants' part, there is the evidence that only three trunks came down to Cornwall station on the night of the 9th, one of which belonged to a young lady—that no trunk was checked from Morrisburgh to Cornwall on that day; and that on the 7th two trunks were checked for Cornwall; that on the 8th seven were checked from Morrisburgh. That the three trunks which arrived on the night of the 9th were taken to the baggage-room; that one was delivered to Jessmer, the cabman; that the plaintiff took the checks of the other two and gave them to one Cassils, who was acting baggageman; that plaintiff then said the carter could not take down the trunks that night, and they had to be left till morning, and took back three checks from Cassils instead of the two that belonged to him; that plaintiff gave different statements as to the place where his third trunk was checked, and as to the contents of the one that was lost.

"The evidence of plaintiff having taken the checks off his trunks in the baggage-room was given by the station-master. Plaintiff contradicted it positively. Cassils, who acted as baggageman, was not called by defendants, as he could not be found, and the evidence of Jessmer is rather corroborative of plaintiff's statement.

"Upon this evidence, the case was left to the jury. They were told that the defendants' duty as common carriers was fulfilled when they placed the baggage on the platform; that if baggage is not claimed as soon as the train arrives, it is placed in the baggage-room, and after that the duty of the defendants is to take the same care of it as of their own property, and that if it is stolen they are not liable, unless the loss is caused by gross negligence on their part. See Bowie *v.* The Buffalo, Brantford & Goderich R. Co., 7

C. P. 191; Hall *v.* Grand Trunk R. Co., 34 U. C. R. 517; Inman *v.* The Buffalo & Lake Huron R. Co., 7 C. P. 325. . . .

"The facts were left to them in a series of questions which were agreed to by the counsel on both sides. Upon considering all the answers given to the questions, I could come to no other conclusion than that the jury had decided in favor of the plaintiff, and that the judgment must be for him.

"Had the jury found that the plaintiff had taken his checks from his trunks in the baggage-room, the case would have been similar to that of Penton *v.* Grand Trunk R. Co., 28 U. C. R. 307, and the judgment must have been for the defendant.

"The evidence was conflicting: if the jury had found for the defendants, I could not have disturbed the verdict, and I do not see sufficient ground for disturbing that for the plaintiff. I therefore refuse to make absolute the order *nisi*."

The defendants thereupon appealed to this court, and the appeal came on for hearing on the 8th and 9th of March, 1886.

Wallace Nesbitt for appellants.

Cattanach for respondent.

HAGARTY, C. J. O.—I find the greatest difficulty in understanding the case made out by the plaintiff in his account of the alleged loss.

As I understand his statements, it appears that he had three trunks;

FACTS. that he gave one of them to one Fraid at Morrisburgh, to be sent on to Cornwall; that he retained the other two, and went about on his peddling business for at least a couple of days, and then, at Iroquois, on the evening of January 9th, plaintiff took the train for Cornwall, checking the two trunks he had with him. It appears that Fraid, the same day or evening that he got the trunk from plaintiff, took it to the Morrisburgh station and checked it there in the ordinary way for Cornwall.

Certainly, two or more likely three days after so doing, Fraid met the plaintiff at the Morrisburgh station on his way to Cornwall and handed him the Morrisburgh check. Plaintiff proceeded to Cornwall with the three checks. It was dark and stormy when he arrived, and he swears he did not that evening see any of his baggage, nor did he look for it.

The next morning he sent down with the three checks one Rookey, a carter. This man says he could only get two trunks on these checks. He says "they were those common trunks that you have boots and shoes in—blue tin—like trunks with goods."

The plaintiff says, in answer to a question: "I suppose this trunk put on at Morrisburgh was pretty heavy, too?" Answer. "I guess so. I have got two locks on it, with a leather cover, but you have only one key to open it."

In his examination in chief he says the trunk that was lost has

two locks, and he then gave a detailed account of the contents—a large quantity of his wearing apparel to $114, and $6 for the trunk. He also states it contained some quilts and goods.

On cross-examination:

Q. I want to find out what was in this trunk you gave to Fraid? A. Goods; quilts.

Q. Nothing else? A. Nothing but quilts.

Q. Nothing but personal baggage? A. No. No personal baggage.

Q. Could you tell us what was in the other trunk? A. I cannot tell what was in it.

Q. Would you swear there was no personal baggage? A. No more than undershirts.

Q. To wear? A. Not to wear. No.

These questions and answers are not explained by the preceding or subsequent context. Plaintiff produced the check for which he got no trunk.

The two checks admitted by defendants to be from Iroquois to Cornwall were numbered 21,811 and 10,799 in the baggage-man's books.

A check, also numbered 21,811, was produced by defendants. The agent said he received it from one Cassils, in the defendants' employ at the time of the loss, but not so received till about a month after, Cassils saying he had got it from plaintiff. Cassils could not be found. He had long left the company's service soon after the loss. Plaintiff denies all knowledge of Cassils.

The duplicate of this last check is produced by plaintiff.

The Morrisburgh baggage-man produced his book, showing that for that train, or in fact for that day, no baggage for Cornwall was received.

He also proved that on the 7th or 8th no numbers like those in question on plaintiff's checks were shipped at Morrisburgh.

On the defence, the plaintiff's statements were contradicted most directly.

It was sworn that three pieces of baggage came from that train that evening, one of which was claimed for a Miss Doran, and the agent Horseman swore he saw the plaintiff take the checks off the other two, and hand them to Cassils, who handed these with another check to the plaintiff, which may have been a check to Miss Doran's trunk, which the carter took that evening—having got her check therefor; and that the plaintiff said they could not be taken and he must leave them till morning. Evidence was given of the most contradictory statements by plaintiff as to his loss, and where he had shipped the trunks, and as to the contents.

I have seldom perused evidence more unsatisfactory.

The jury answered questions nearly all in favor of the plaintiff—that two trunks were shipped at Iroquois and one at Morris-

burgh—no evidence when; that the two checked at Iroquois did arrive at Cornwall. So did that checked at Morrisburgh, etc. No questions out of the eighteen asked referred to the point as to which trunk contained plaintiff's personal baggage.

The learned judge says in his charge: "I think there is no question whatever but that he delivered at Iroquois the trunk which bore the check 21,811, this check which is said to have been upon the trunk that is said to have been lost."

CHARGE TO JURY.

The evidence of defendants' baggage-man would show that 21,811 and 10,799 were the checks on the two trunks from Iroquois.

The learned judge also says: "Vineberg states . . . that one was checked at Morrisburgh, and that Fraid brought him the duplicate, being the check 21,811, which was one of the duplicates which Vineberg himself got at Iroquois."

In view of the evidence and the nature of the defence set up, it may have had an unfavorable effect on the jury for the learned judge to have assumed as proved the matters in the first citation from his charge. It is to be regretted that more care was not taken at the trial to prove the character and description of each trunk as to blue tin and leather cover, etc.

If the case rested solely on these questions of fact, I think we should not hesitate to direct that there should be a new trial—not on the mere question of weight of evidence, but for the better understanding of their true nature.

We have now to dispose of the legal objection on the motion for nonsuit, which was in substance that the contract of carriage was fulfilled and the goods delivered at the station at Cornwall.

The evidence of the plaintiff is, at least, on this question unmistakable, and the findings of the jury are to the same effect. He swears that he did not see the trunks when he arrived at the station; that he did not personally ask any one for them; that he went away with the omnibus, deciding to leave them there that night and send for them in the morning.

FULFILLMENT OF CONTRACT OF CARRIAGE—EVIDENCE AND FINDINGS.

The jury find that the two trunks did arrive at Cornwall station.

That the trunk checked at Morrisburgh was carried to and put out at Cornwall station.

That two trunks were at Cornwall station ready to be delivered to plaintiff when he called for them.

That he did not apply for his trunks on the arrival of the train.

That he did apply next morning, but only got two trunks.

That the plaintiff had not a reasonable time to apply for the trunks on the evening of the 9th after the arrival of the train.

That he did apply for them next morning.

I think these two last findings—the facts being undisputed—cannot add to the defendants' liability. If the voluntary delay

of about 12 hours in not claiming delivery of baggage be in itself a failure of duty on the plaintiff's part to be ready to receive his baggage on arrival, we cannot hold that the finding of the jury as to his being in a reasonable time can make the carriers liable as such.

This action is against the defendants solely as common carriers.

When defendants put the goods on the platform ready to be delivered to the plaintiff, and he having the fullest opportunity of claiming and receiving them, but elects to leave them unclaimed till next day, it would seem that their liability as carriers is at an end, and that assuming they put the goods into a baggage-room or warehouse, they could not be under any higher liability than that of warehousemen.

In Penton *v.* Grand Trunk R., 28 U. C. R. 367 (1871), it appeared that the plaintiff was a passenger to Seaforth, with two checked trunks, and they were put on the platform, and he assisted the defendants' servant to put them in the baggage-room, and went up in an omnibus to a hotel; this being about 3 P. M. About 8 that evening he sent for them, but one was gone. The evidence went to show that it was stolen. SAME—REVIEW OF AUTHORITIES.

The judgment of the court was delivered by Wilson, J., in favor of the defendants. He says: "The plaintiff was entitled to a reasonable time after the goods were put upon the platform to call for and take them away. There is no room for doubting but that he had this full and ample reasonable time for the purpose, which takes this case from the effect of some other of the authorities cited for plaintiff."

Hall *v.* Grand Trunk R., 34 U. C. R. 517, may be referred to.

In Shepherd *v.* Bristol & Exeter R., L. R. 3 Ex. 189, Bramwell, B., says: "The plaintiff complains of a breach of duty or contract by defendants as carriers. This is the form and substance of the complaint. The question is not whether he has some cause of complaint against some company or person, but whether he has a cause of complaint against defendants as carriers. The defendants say he has not, and that nothing more remained to be done by them under their contract as carriers when the alleged damage occurred. This is the question, and it seems to me better to put it thus," etc. Patscheider *v.* Great Western R. Co., 3 Ex. D. 153.

It is laid down that it is the company's duty when the passenger's baggage reaches its destination to have it ready for delivery upon the platform at the usual place of delivery until the owner, in the exercise of due diligence, can receive it, and the liability does not cease until a reasonable time has been allowed to the owner to do so.

The article lost was delivered, as plaintiff saw, on the platform at Paddington with her other luggage; the hotel adjoins the station.

She went to the porter of the hotel to take the luggage to the hotel, but when she subsequently arrived there she could not find the box among the luggage which the porter brought. There was conflicting evidence with respect to the box after being taken from the train and placed on the platform. The jury found there had been no delivery to plaintiff, and no negligence by her.

The court held that the box must be placed on the platform until the passenger has the opportunity of calling for and receiving it, and the jury were justified in holding there was no delivery.

The rule in Redfield on Carriers is quoted approvingly: "It is the duty of railway companies to have the baggage ready for delivery upon the platform at the usual place of delivery until the owner, in the exercise of due diligence, can call and receive it, and it is the owner's duty to call for and receive it within a reasonable time."

In Hodkinson *v.* London and Northwestern Co., 14 Q. B. D. 228, the plaintiff arrived at the station with two boxes, which were taken from the van by defendant's porter. He asked should he call a cab. She said she would walk to her destination, and would leave her luggage at the station and send for it. The porter said: "All right; I will put them on one side, and take care of them." This was at 4.25 P.M. At about 6 o'clock the same evening she returned for her box.

The porter said he had given one of them to a woman who he thought was the owner.

It was never recovered.

In the county court the judge held that the plaintiff had never resumed possession of this box, and that it was all the time in the custody of the defendants.

On appeal, Lord Coleridge, C. J., held that when the plaintiff's luggage was taken from the van and placed at her disposal the company's responsibility was at an end. The plaintiff, when she quitted the station, left her luggage in the custody of the porter, who had then ceased to be acting as the company's agent. He adds that Patscheider *v.* Great Western R. Co. is clearly distinguishable. There the plaintiff had no opportunity of taking possession of her box.

Many American authorities support this view.

I am placing the case wholly on the plaintiff's testimony. If the defendants' evidence is to be believed it would also be fatal to the plaintiff, as it is sworn that he took the checks off the baggage himself.

We must treat this case solely as against common carriers. As Bramwell, B., remarked, if the plaintiff have any other claim against the company or any one else, he should pursue it. He should

give evidence leading to the conclusion that the defendants were liable to him in their narrower responsibility as warehousemen or bailees of these goods after he had elected to leave them at the station for eleven or twelve hours.

If the trunk lost had really been the Morrisburgh trunk, which he swears contained merchandise, he could not recover for it in this action.

We must certainly infer from the evidence that this Morrisburgh trunk in the nature of things must have been one or two or three days at Cornwall station before plaintiff arrived there.

It appears to me the appeal must be allowed, with costs; and the rule for nonsuit in the court below be made absolute, with costs.

BURTON, J. A.—The difficulty which I at first felt in concurring in a nonsuit arose from the tenth finding of the jury, that the plaintiff had not a reasonable time after the arrival of the train at Cornwall in the evening of the arrival to apply for his trunks, but upon a careful examination of the evidence I am of opinion that there was no evidence upon which a jury could reasonably come to such a conclusion.

I think the mere delivery upon the platform is not of itself sufficient to absolve the defendants from responsibility as carriers, but it must still be considered as under their control as carriers until the passenger has an opportunity of claiming it, and if it had been shown that the officer of the company had left the station without affording the plaintiff such an opportunity, their obligation as carriers would have remained undischarged until such opportunity had been afforded. DELIVERY OF BAGGAGE—WHAT AMOUNTS TO.

The two boxes checked at Iroquois, of which that now claimed by the plaintiff was one, the jury have found were delivered at the Cornwall station; the plaintiff, instead of going forward to receive delivery, voluntarily refrained from doing so, on hearing from the cabman that he could not conveniently take his baggage, as he had one trunk already, and he thereupon deliberately decided to send down for it in the morning. It is not necessary to consider whether the company might be liable as warehousemen under such circumstances; but it is sufficient to say that the plaintiff has not made out a case for charging them as carriers. The other finding of the jury that the sending down in the morning for the trunks was within a reasonable time, was, under the circumstances, purely a matter of law which ought not to have been submitted to the jury at all.

I agree, therefore, in holding that the appeal should be allowed and a nonsuit entered.

PATTERSON and OSLER, JJ. A., concurred.

Appeal allowed with costs.

Loss of Baggage—When Liability as Common Carrier Ceases.—See McCormick *v.* Penn. Cent. R. Co., 2 Am. & Eng. R. R. Cas. 636; Clark *v.* Eastern R. Co., 21 Ib. 307; Hoeger *v.* Chicago, Milwaukee & St. Paul R. Co., and note, 21 Id. 308–312.

International and Great Northern R. Co.

v.

Willard.

(*Advance Case, Texas. October* 22, 1886.)

A passenger on defendant's road was carried past the station at which he wished to stop, and put off at the east end of a trestle across the river. His gun was put out on the embankment after the train had crossed to the west end. When he boarded the train he was directed to place the gun in the baggage-car. He delivered it to a person there, who demanded and received 25 cents for the service. He walked across the trestle and got his gun, and in crossing back with it, his feet being wet and covered with mud, his foot slipped, and he fell upon the cross-ties, and received injury, for which he brought suit. *Held* that he could not recover.

Appeal from District Court, Anderson county.
Jno. Young Gooch for appellant.
Marsh Glenn and *John J. Wood* for appellee.

Gaines, J.—Appellee, being a passenger on appellant's road, with his gun, going from Palestine to Long Lake, was carried past the latter station a short distance, and put off on the trestle across
Facts. the Trinity river, near its east end, and his gun put out on the embankment after the train had crossed to the west end. He walked across the trestle and got his gun, and, in crossing back with it, his foot slipped, and he fell upon the cross-ties, and received an injury, for which he obtained a verdict and judgment in the court below. Appellee testified that when he approached the train to take passage he was met at the door of the passenger coach by a servant of the company, and told that he could not take his gun into the coach, but must place it in the baggage-car. He went forward to the car next to the tender, which was the first he saw open, and, seeing a man in the car, delivered the gun to him, to be carried to his destination, and after paying this person 25 cents, which he demanded. There was evidence tending to show that the man who received the gun was the agent of the express company. Appellee testified, in effect, that he took him for the servant of the railroad company.

The court charged the jury, in substance, that if appellee placed

the gun in charge of the express company on the train, relying upon the railroad company to deliver it to him, and the latter's servants knew this, the railroad company was bound to deliver the gun, or allow time for its delivery at Long Lake; and refused a special instruction asked by appellant to the effect that if appellee placed his gun in charge of the express company to be carried to his destination, then the express company was responsible for its safe delivery, and appellant could not be held liable for an injury resulting from its being put off the train at an improper place.

The action of the court in reference to these charges is assigned as error, but we think the point raised by these assignments is not well taken. It was the duty of the railroad company to take charge of defendant's gun, upon their servants being apprised of his wish to have it carried with him; and if the company's servants neglected to do this, but directed him to place it with the baggage on the train, and if, in attempting to do this, he by mistake delivered it to the agent of the express company, we think appellant as much bound for its delivery as if it had been placed directly in charge of its own servants. To hold otherwise would be to permit a carrier to neglect a duty imposed upon him by law, and thereby relieve himself of a responsibility which would have attached to him in case that duty had been performed. No one should be allowed in this manner to take advantage of his own wrong.

LIABILITY OF COMPANY FOR DELIVERY OF BAGGAGE TO EXPRESS AGENT.

It is also assigned as error that the verdict of the jury is contrary to the law and evidence, because the evidence showed that the train stopped at Long Lake a sufficient length of time for defendant to alight and get possession of his gun; that he failed to do this; and that his own negligence in this regard was the cause of his being put off on the trestle. Upon the question of whether the train stopped at the station or not, the evidence was decidedly conflicting. It was the peculiar province of the jury to weigh the testimony, and determine the question, and their verdict will not be disturbed in this court in such case where there is sufficient evidence to support the finding.

STOPPAGE OF TRAIN AT STATION.

But the more serious question presents itself whether, under appellee's own testimony as to the causes which led immediately to the injury complained of, he has any right to recover of the company. He was put off the train in the daytime, and had ample opportunity to deliberate as to the course best for him to pursue under the circumstances. He crossed the trestle for his gun, and, in going down the embankment, got mud upon his feet. He testified, further, that, by reason of this mud, his foot slipped in crossing back, and he fell upon the crossties, and thus received the injury. It would seem that when his gun was put off the conductor suggested that he could cross the trestle, and get it. It is held that when a passenger is told to

CONTRIBUTORY NEGLIGENCE OF PLAINTIFF.

alight from a train by the conductor, and the passenger, being suddenly put to his election whether he will be carried past his destination or alight from a car in motion, does alight, and receives an injury, he is not necessarily guilty of contributory negligence. But the case before us presents no such sudden emergency. And even admitting, for the sake of the argument, that appellee was not negligent in crossing the trestle in the first instance, can it be said he exercised ordinary prudence in attempting to recross with muddy feet? He must have seen the danger, and could have avoided it; and, if he saw proper to take the chances of crossing in safety, the railroad company cannot be held responsible if he was injured in the attempt. For any loss that occurred to him by reason of his being put off on one end of the trestle, and his gun beyond the other end, the company was liable to him. Appellant is responsible for loss or damage to appellee which was the probable and natural consequences of the neglect of its servants in the particulars complained of, but is not responsible for injuries resulting from dangers which a prudent man, with time to consider, would have avoided.

Because of the error indicated, the judgment is reversed, and the cause remanded.

COUDY

v.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN R. CO.

(85 *Missouri*, 79.)

A petition in an action by a passenger against a railroad for injuries resulting from its negligent management of its train is sufficiently specific in its averments of the acts constituting the negligence, which charges that "the defendant, by and through its servants, agents and employees in charge of and managing said train, negligently and unskilfully ran and managed the same in such a way as to cause the said train and the car in which the said plaintiff was being conveyed as to check its speed very suddenly and to jolt and pitch the same suddenly and with great force backward and forward in such manner and with such force as to cast and throw said plaintiff out of said car and upon the platform and from said platform onto the track of said railroad, under the said cars and train, by means and by reason of which said cars and train ran upon and over the left arm and left leg of the plaintiff."

The trial court in this case did not err in overruling a demurrer to plaintiff's evidence interposed by defendant on the grounds that the evidence showed that plaintiff was guilty of contributory negligence, and that such evidence as to the manner in which the accident occurred was irreconcilable with the physical facts attending it.

It is for the jury and not for the court to pass on the credibility of witnesses; to determine the weight to be given to their testimony and to reconcile conflict therein.

Where in an action by a passenger against a railroad company for an injury received in operating its train, the occurrence of the injury through the mistake of the carrier is shown, a presumption of negligence arises against the latter which casts upon it the burden of showing that the accident happened notwithstanding the exercise on its part of the high degree of care which the law imposes on it.

APPEAL from St. Louis Court of Appeals.
Affirmed.
Bennett Pike for appellant.
Johnson, Lodge & Johnson for respondent.

NORTON, J.—This suit was instituted in the Circuit Court of the city of St. Louis by plaintiff to recover damages for personal injuries received by him while a passenger on one of de- FACTS. fendant's trains, alleged to have been occasioned by the negligence of defendant in the management of its train. The answer was a specific denial of the facts alleged in the petition, and also set up contributory negligence on the part of plaintiff. On the trial plaintiff obtained judgment for $6000 damages, from which defendant appealed to the St. Louis Court of Appeals, where the judgment was affirmed, from which defendant has appealed to this court.

The first point made in the brief of counsel is that the court erred in overruling defendant's objection to the introduction of any evidence under the petition, which objection was based on the ground that the petition only contained a general charge SUFFICIENCY OF PETITION. of negligence. This point is not well taken. The petition, after setting out that plaintiff was a passenger on defendant's train, contains the following averments as to negligence, viz.: That "the defendant, by and through its servants, agents and employees in charge of and managing said train, negligently and unskilfully ran and managed the same in such a way as to cause the said train, and the car in which the said plaintiff was being conveyed as aforesaid, to check its speed very suddenly, and to jolt and pitch the same suddenly and with great force backward and forward in such a manner and with such force as to cast and throw said plaintiff out of said car and upon the platform thereof, and from the said platform onto the track of said railroad under the said cars and train, by means and by reason of which the wheels of the said cars and train ran upon and over the left arm and left leg of the said plaintiff," etc. These averments sufficiently notified defendant of what it had to defend against, and could not well be made more specific.

The next error assigned is the action of the trial court in over-

ruling defendant's demurrer to the evidence at the close of plaintiff's case. The plaintiff, who was a boy fourteen or fifteen years of age at the time of the accident, testified as follows: "I was hurt August 25, 1880; was at that time living near Elwood station, Carondelet, and working on Third street and Chouteau avenue. I came up on the Iron Mountain road that morning; left home about six o'clock; my brother John came with me. I bought a ticket at Elwood station, and gave it to the conductor on the car that morning. I took a seat in the car, the fourth from the last one in the train. I had three bundles right on the seat opposite me; one of them fell in the aisle, and as I raised to pick it up there was a sudden jar, unusual, which threw me out. The seat I and my brother occupied runs parallel with the side of the car; the other seat to the right was crosswise. The door opened on the opposite side east of me; the door was open at the time; the weather was warm. As I rose to get my bundle the jar threw me out against the railing and broke my teeth, and threw me backward off the car. I struck my head and it knocked me senseless. The train ran over my left leg and arm. At that time the train was a little north of Miller street; I noticed at the time we were just at Miller street. I was senseless when the wheels ran over me; I did not recollect for three or four days what had been done to me. The train checked right up running swift, did not leave much speed on at all; up to that time they seemed to be running very swift, I cannot say how fast. When I first came to consciousness I was in the city hospital; do not know what day that was; my left arm and leg were then off. I remained at the hospital for two months, and was confined to the house for three or four months afterwards."

OVERRULING DEMURRER TO EVIDENCE—PLAINTIFF'S TESTIMONY.

On cross-examination, the witness said: "Before the bundle fell off the seat I had ridden from Elwood station to Miller street; the jarring of the car caused the bundle to fall off the seat; when it fell off I stooped down to pick it up. The bundle fell off the end of the seat; it contained my blouse. The door opened to the east side of the car opposite me; it was opened straight with the aisle of the car; I did not look to see whether anything held it fast; I do not think the door moved; when the jar came it did not close. The iron railing was on the end of the car. When I was thrown out of the car I did not go exactly straight; I suppose I must have went from one side to the other. I struck the upper part of the railing. I was in the habit of getting off the train after it stopped at the gas-house, where they changed engines, foot of Poplar street. I struck the railing on the car and was thrown backward, and fell on the ground and struck on a piece of iron, I think. I did not talk to Dr. Dean at the hospital and tell him how the accident happened; I never saw Dr. Dean at the hospital that I know of. I fell backward off the step on the west side of the car. I did not see any colored porter on the train."

The evidence of this witness was corroborated by that of his brother, John Coudy, as to the position occupied by plaintiff in the car, and as to the fact that one of his bundles had fallen off the seat on the floor of the car, and the fact that plaintiff, while stooping to pick it up, was, by a sudden jerk of the car, thrown through the open doorway onto the platform. While this witness stated he did not see his brother fall off the platform, he also stated that at that time his attention was attracted by people running on the street, and that when the train stopped five blocks north of Miller street he got off and went back and found plaintiff with his arm and leg crushed. This witness also stated that on the switch rail that leads into the track that the train was on there was a mark of blood where plaintiff struck his head; and this was about a foot and a half from the main rail that the train was on. His evidence as to the train being suddenly checked is corroborated by that of one Houett, who testified that he saw the train coming up at a pretty good speed and watched it go across Miller street, and just as it crossed the steam was shut off and the air brakes put on, and the wheels stopped turning and slid along. His evidence as to his teeth being broken and his falling on the back of his head was corroborated by that of Mrs. Coning, who stated that on the day of the accident she found the back of his head injured, his lip cut and teeth broken.

It is insisted by counsel that his demurrer to this evidence ought to have been sustained, first, because it showed that plaintiff was guilty of contributory negligence, and, second, because the evidence as to the way the injury occurred was irreconcilable with the physical facts attending it. We are not willing to lay it down as a rule of law that the plaintiff, a boy of fourteen or fifteen years of age, who left his seat in the car to pick up a package belonging to him, which had fallen from the place where it had been deposited onto the floor of the car, was guilty of contributory negligence in so doing. Such action on his part was the result of a natural impulse to take care of his own, and contributory negligence can no more be imputed to him on that account than if he had left his seat to procure a drink of water. While it may be customary to forbid passengers from standing on the platform of cars, no precautionary rule was shown to exist forbidding them from standing up in the cars while in motion. An ingenious and plausible argument has been made by counsel to show that the physical facts surrounding the accident are irreconcilable with plaintiff's account as to how it occurred. In view of the fact that plaintiff's account of it is positive and direct, and the fact that it is corroborated in its most important particulars by two or three witnesses, and the fact (which the demurrer to the evidence admits) that the checking of the train was so sudden as to throw plaintiff through the open door onto the platform and

CONTRIBUTORY NEGLIGENCE OF PLAINTIFF.

against the railing, with such force as to break his teeth and cause him to fall backward off the platform and down the steps, we are not prepared to say that the physical facts to which we have been referred by counsel so overcome the facts testified to as to render them untrue and impossible. Even conceding, as is contended, that as a physical fact, if plaintiff fell from the platform as he swears he did, he would have fallen beyond the reach of the rails on which the cars were running and from which he fell, it would not necessarily follow from this that plaintiff, stunned as he was by the fall, could not and did not in his struggles come with his left leg and arm within reach of the rails on which the cars were running. Such a result was not only possible, but might well take place. The argument addressed to us on this branch of the case might well have been addressed, as it doubtless was, to the jury whose province it was to pass upon such a question. The duty of passing upon questions of fact belongs to juries and that of passing upon questions of law to the courts, and the courts have no more right to invade the province of juries as to matters of fact than juries have to invade the province of courts as to matters of law.

DUTY OF JURY TO PASS ON EVIDENCE.

It is further insisted that the court erred in refusing to instruct the jury after all the evidence was in that plaintiff could not recover. The evidence put in by defendant tended to show that plaintiff, instead of being injured by his being thrown from the car as detailed by him, was injured by his own recklessness in attempting to get off the cars, and was contradictory in other respects to that of plaintiff. It was for the jury and not the court to pass on the credibility of the witnesses, and to reconcile, if they could, any conflict, and determine what weight was to be given to the evidence of the respective witnesses, and for this reason, under repeated rulings of this court, the instruction was properly refused.

PRESUMPTION OF NEGLIGENCE IN CASE OF ACCIDENT.

The court gave an instruction predicating the right of plaintiff to recover on the facts stated in the petition, and told the jury that if they believed from the evidence that those facts were true they would find for plaintiff, unless they further found that the checking of the train was the result of some unforeseen or unavoidable accident beyond the control of defendant's agents, and that the burden of proof was on the defendant to show such fact. It is claimed that this instruction is erroneous in that it devolves on defendant the burden of excusing the sudden checking of the train. The instruction, we think, is sustained by the authorities, which hold that when an injury is shown to have been occasioned by an error of the carrier or his servants in operating the instrumentalities employed in the business of carrying, a presumption of negligence arises against the carrier, which casts on him the burden of showing that the accident happened notwithstanding the exercise on his part of the high

degree of care which the law imposes upon him. Skinner *v.* Railroad, 5 Exch. 786; Stokes *v.* Saltonstall, 13 Peters, 181; Railroad Co. *v.* Pollard, 22 Wall. 341; Farrish *v.* Reigle, 11 Gratt. 697; Holbrock *v.* Railroad Co., 12 N. Y. 236; Stockton *v.* Frey, 4 Gill, 406; Fairchild *v.* Stage Co., 13 Cal. 599; Meier *v.* Railroad, 64 Pa. St. 225, 230; Dougherty *v.* Mo. Pac. R. Co., 9 Mo. App. 478, which was affirmed by this court. In the case of Scott *v.* Dock Co., 11 Jur. N. S. 1108, the rule is laid down thus: "Where the thing is shown to be in the management of defendant or his servants, and the accident is such as, under an ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence in the absence of explanation by defendant, that the accident arose from want of proper care."

The question as to whether plaintiff was or was not guilty of contributory negligence was fairly submitted to the jury in the instructions given, and while the evidence relating to it was contradictory and conflicting, it was the province of the jury before whom the witnesses appeared to judge of their credibility, and for that reason we do not feel at liberty to interfere with their finding, although it might seem to us to be against the weight of the evidence.

Judgment affirmed, in which all concur.

Presumption of Negligence in Case of Injury—Burden of Proof.—See D. L. & W. R. Co. *v.* Napheys, 1 Am. & Eng. R. R. Cas. 52; George *v.* St. Louis, etc., R. Co., 1 Ib. 294; Iron R. Co. *v.* Mowrey, 3 Ib. 361; Pittsburgh, etc., R. Co. *v.* Williams, 3 Ib. 457; Cleveland, etc., R. Co. *v.* Newell, 3 Ib. 483; New York, etc., R. Co. *v.* Daugherty, 6 Ib. 139; Phila., etc., R. Co. *v.* Anderson, 6 Ib. 407; Ohio, etc., R. Co. *v.* McCool, 8 Ib. 390; Federal St., etc., R. Co. *v.* Gibson, 11 Ib. 142; Little Rock, etc., R. Co. *v.* Miles, 13 Ib. 10; Smith *v.* St. Paul City R. Co., 16 Ib. 310; N. Y., etc., R. Co. *v.* Seybolt, 18 Ib. 162; E. Tenn. R. Co. *v.* Stewart, 21 Ib. 614.

Hipsley

v.

Kansas City, St. Joseph and Council Bluffs R. Co.

(*Advance Case, Missouri. March* 18, 1886.)

When plaintiff gives evidence tending to prove that he was a passenger on defendant's train and that he was injured by the derailment of the train, without any fault on his part, he makes out a *prima facie* case entitling him to a verdict, unless it is rebutted and overcome by evidence of defendant showing that the accident was not caused by its want of care and negligence.

Evidence in such case on the part of defendant that the train was derailed

by the breaking of a sound, well-spiked rail; that the ties were good, sound oak ties, and the road-bed straight and well ballasted; that the train was at proper speed; that the break was a fresh break and disclosed neither flaw nor defect in the broken rail, but was the result of frost; that sound iron and steel rails would break from frost, and there was no way to prevent it, is not sufficient to justify a nonsuit.

Juries are the sole judges of the credibility of witnesses and the weight of their evidence. A court errs when it invades the province of the jury.

The plaintiff's evidence in such case must be confined to the condition of the road-bed at the time and place of the accident, or its immediate vicinity.

Evidence that the road in other places was not in good condition, but was subsequently repaired, and of accidents on other parts of the road, is inadmissible.

APPEAL from the Nodaway County Circuit Court. Reversed.

Action for damages for personal injuries.

The facts are fully stated in the opinion.

Johnston & Anthony for appellant.

Strong & Mosman for respondent.

NORTON, J.—Plaintiff, who was a passenger on defendant's road to be carried from the town of Bocklow in Andrew county to FACTS. Hopkins in Nodaway county, brought this suit to recover damages for injuries sustained by him, caused by the derailment of the train on which he had taken passage.

After all the evidence, both on the part of plaintiff and defendant, was introduced, the court, at defendant's instance, gave an instruction that, under the pleadings and evidence, plaintiff was not entitled to recover, and took the case from the jury.

From the judgment of the court in refusing to set aside the nonsuit which this action compelled the plaintiff to take, he prosecutes this appeal, and assigns for error the action of the court in refusing to receive proper evidence, and in giving said instruction.

The evidence on the part of plaintiff established the fact that he was a passenger in one of defendant's cars on the 7th of January, 1881; that on the night of that day, about 7 o'clock, all the train except the engine and baggage car was derailed, and the car in which plaintiff was seated was thrown down an embankment, in consequence of which he received injuries the nature of which were testified to by himself and a physician. This was all the evidence on the part of plaintiff.

The defendant, to overthrow the *prima-facie* case thus made, put in the evidence of a number of witnesses, all of whom concurred in stating that the train in question was derailed by reason of the breaking of a rail; that the rail which broke was a good, smooth, sound rail, neither worn nor shattered; that at the place of the accident the road was straight and well ballasted with cinders; that the ties were good, sound, oak ties; that the rails were well spiked with four good spikes to each tie; that the break was a

fresh break, and disclosed neither flaw, crack, nor other defect in said broken rail; that the speed of the train was from twenty-two to twenty-five miles per hour; that it was extremely cold the night of the accident; that rails, whether of iron or of steel, would break in cold, frosty weather, and that there was no way known to anticipate prevent this; that rapid speed on a straight track would not be or more likely to break a rail than a slow rate, but would be likely to cause a more serious result or accident if a rail did break.

The plaintiff offered no evidence in rebuttal.

In the case of Lemon *v.* Chanslor, 68 Mo. 341, we had occasion to consider the rights of a passenger, and the duty, under the law, which that relation cast upon the common carrier, and it was there held that when the evidence shows that a passenger, without fault of his own, receives injury by the overturning or breaking down of the vehicle in which he is being carried, a *prima facie* case is made out for him, and the onus is cast upon the carrier of relieving himself from responsibility by showing that the injury was the result of an accident which the utmost skill, foresight and diligence could not have prevented.

MAKING OUT PRIMA FACIE CASE—BURDEN OF PROOF.

This rule was applied in a case where horse-power and a hack were used by the carrier for carrying passengers, and it applies with equal, if not greater force when the more powerful instrumentality of steam is used as the motive power.

While carriers are not insurers of the absolute safety of passengers, and are not responsible for inevitable and unavoidable accidents, regard for the safety of human limb and life has led to the adoption of the rule announced. It follows from this ruling that plaintiff having offered evidence tending to prove that he was a passenger on defendant's train and that he was injured, without any fault on his part, by the derailment of the train, made out a *prima facie* case entitling him to a verdict, unless it was rebutted and overthrown by the evidence of defendant showing that the accident was not the result of that want of care and vigilance which the law made it obligatory on defendant to bestow.

It is contended by appellant that inasmuch as juries are the sole judges of the credibility of witnesses and the weight of their evidence, it was their province and not that of the court to pass upon the credibility of the witnesses and the weight to be given their evidence; and that in doing this, and giving the instruction objected to, the court invaded the province of the jury. The point made, we think, is fully sustained by the following cases: Kenney *v.* H. & St. J. R. Co., 80 Mo. 573; Gregory *v.* Chambers, 78 Mo. 298, 299; Myers *v.* Union Trust Co. 82 Mo. 238; Bryan *v.* Wear, 4 Mo. 106; McAfee *v.* Ryan, 11 Mo. 365; Steamboat *v.* Matthews, 28 Mo. 248; Bradford *v.* Rudolph, 45 Mo. 426.

PASSING ON EVIDENCE PROVINCE OF THE JURY.

The facts stated by defendant's witnesses, if established to the satisfaction of the jury, would unquestionably constitute a complete defence to plaintiff's action.

Where the right of juries to pass upon the credibility of witnesses and the weight of their evidence is abused by them in arbitrarily disregarding the uncontradicted evidence of witnesses, disinterested and unimpeached, either by their manner of testifying or otherwise, the corrective is to be found in the right of the *nisi prius* judge to set aside the verdict on proper motion, and take the verdict of another jury, or by the action of this court, whenever it appears in a case that the verdict of a jury is so clearly against the weight of evidence that it must have been one of passion or prejudice.

The court did not err either in refusing to allow plaintiff to show that, several months after the accident, defendant repaired its road by putting in new rails and ties in various places. Ely *v.* Railroad, 77 Mo. 34; nor in confining plaintiff's evidence to the condition of the road-bed at the place and immediate vicinity of the accident, and to its condition at the time of the accident; nor in refusing to allow plaintiff to show that accidents had previously occurred on other parts of defendant's road. The fact that the road in other places may not have been in good condition had no tendency to prove that it was in a bad condition at the place where the accident in question occurred.

Judgment reversed and cause remanded.

All concur.

Derailment Occasioned by Rails Broken from Frost.—Negligence may be inferred from the fact that a rail breaks, and an injury results therefrom, but this inference may be overcome by showing that the rails were subjected to all the proper tests before they were laid and that they were properly laid. Cleveland, etc., R. Co. *v.* Newell, 75 Ind. 542; Brignoli *v.* Chicago, etc., R. Co., 4 Daly, N. Y. C. P., 182; Pittsburgh, etc., R. Co. *v.* Williams, 74 Ind. 462; Michigan, etc., R. Co. *v.* Lantz, 29 Ind. 528.

It is not sufficient that the rail was free from defects, and of sufficient size and weight. It must also be shown that an allowance was made for the expansion or contraction of the rails under the extremes of heat and cold incident to the climate. Pittsburgh, etc., R. Co. *v.* Williams, *supra*; Reed *v.* N. Y. Central R. Co., 56 Barb. N. Y. 493.

But in McPadden *v.* N. Y., etc., R. Co., 44 N. Y. 478, an action, to recover damages for injuries sustained by plaintiff upon defendant's road resulting from a derailment due to a rail breaking on account of the frost or extreme cold, it was *held*, that the breaking of a rail from such cause does not impose any liability upon the company for the consequences.

Where a passenger was injured by the breaking of an axle from the effect of frost, the court held that "if the defendant was guilty of any, even the slightest, negligence in not providing against such a result, it was liable."

This seems to be equivalent to holding that if by any precaution the result could have been averted, the defendant was bound to exercise such precaution, and failing to do so was liable for negligence.

See Dawson *v.* Manchester, etc., R. Co., 5 L. T. (N. S.) 682; Toledo, etc.,

R. Co. *v.* Apperson, 49 Ill. 480; Reed *v.* N. Y. Central R. Co., 39 How. P. R., N. Y. 407.

Negligence Presumed from Derailment of Train.—See Note to St. Jo. & W. R. Co. *v.* Wheeler, 26 Am. & Eng. R. R. Cas., 179; N. Y., etc., R. Co. *v.* Seybolt, 18 Ib. 162; Little Rock, etc., R. Co. *v.* Miles, 13 Ib. 10; George *v.* St. Louis, etc., R. Co., 1 Ib. 294; Pittsburgh, etc., R. Co. *v.* William, 3 Ib. 457; Cleveland, etc., R. Co. *v.* Newell, 3 Ib. 483; Phila., etc., R. Co. *v.* Anderson, 6 Ib. 407. See, also, Coudy *v.* St. Louis, etc., R. Co., *ante*, p. 282.

Vicksburg and Meridian R. Co.

v.

Putnam.

(118 *U. S. Supreme Court Reports*, 545.)

In an action against a railroad corporation by a passenger, for a personal injury caused by a car being thrown off the track in consequence of a worn-out rail, the admission of evidence that the general condition of that portion of the road which included the place of the accident had long been bad, and that the rails had been in use a great many years, affords the defendant no ground of exception.

The official reports of the superintendent of a railroad to the board of directors are competent evidence, as against the corporation, of the condition of the road.

At a trial by jury in a court of the United States, the judge may express his opinion upon the facts; the expression of such an opinion, when no rule of law is incorrectly stated, and all matters of fact are ultimately submitted to the determination of the jury, cannot be reviewed by writ of error; and the powers of the courts of the United States in this respect are not controlled by State statutes forbidding judges to express any opinion upon the facts.

In an action for a personal injury, the plaintiff is entitled to recover compensation, so far as it is susceptible of an estimate in money, for the loss and damage caused to him by the defendant's negligence, including not only expenses incurred for medical attendance, and a reasonable sum for his pain and suffering, but also a fair recompense for the loss of what he would otherwise have earned in his trade or profession, and has been deprived of the capacity of earning, by the wrongful act of the defendant.

In an action against a railroad corporation by a passenger, for personal injuries impairing his capacity to earn his livelihood, standard life and annuity tables are competent evidence for the consideration of the jury, but not absolute guides to control their decision.

This was an action against a railroad corporation for personal injuries received on September 16, 1881, by a passenger (then forty-nine years of age), from the car in which he was seated being thrown off the track, in consequence of a worn-out rail and rotten cross-ties, whereby his collar-bone, shoulder-blade, and several

ribs were broken, and his sight, hearing, ease of breathing, and capacity to do business impaired.

At the trial it appeared that the accident happened between the stations of Edwards and Bolton, and that the heaviest traffic was over that part of the road.

A witness, who had travelled over the road some twenty-five times, was asked by the plaintiff the condition of the road between those places. The defendant objected to any evidence of the condition of the road generally, or at any place except at the place of the accident in question. But the court overruled the objection, and permitted the witness to answer that the condition of the road between those places was bad; and the defendant excepted.

The plaintiff offered in evidence two printed reports made by the superintendent of the road to the board of directors, one in 1877, which stated that in the portion of the road where the heaviest traffic was done there were about thirty-five miles of iron that had been run over for more than twenty-five years, and required the closest attention to prevent accidents; and the other, made in 1880, stated that there were twenty-five miles of track made of iron forty-two years in service, and now almost entirely worn out. The defendant objected to the admission of these reports, because they were not sworn to under examination in court; because they had no reference to the place of the accident, but only to the general condition of the rails; because they could not bind the defendant as admissions; and because the information of the superintendent as to the condition of the road was derived in part from the reports of subordinates. But the court overruled the objections, and admitted the reports in evidence; and the defendant excepted.

The plaintiff testified to the extent of his injuries, as alleged in the declaration, and that they had been improving and he was gradually getting relief, but that he never expected to get entirely well; and further testified as stated in the charge of the court, quoted below. The surgeon who attended him likewise testified to the extent of the injuries, and, among other things, as follows: "The injuries in such cases are apt to be permanent; sometimes they grow worse, and sometimes they get well. Sometimes they get entirely well; in other cases they do not; cannot tell how it will be in the plaintiff's case."

The plaintiff offered in evidence two tables, the first entitled "Expectation Table of Assured Lives," which an agent of the Equitable Life Insurance Company testified was the table used by the American Life Insurance Company, and which showed, at forty-nine years old, "Expectation, years 21.6." The second, a table from Reese's Manual, entitled a "Table showing the Value of Annuities on Single Lives according to the Carlisle Table of Mortality," which showed the present value of an annuity of $1 a

year for the life of a man aged forty-nine to be $10.82. To the admission of each of these tables the defendant objected, because "the plaintiff had not shown a case in which such evidence is admissible, the plaintiff not having been killed or permanently disabled." But the court overruled the objections, and admitted the tables in evidence; and the defendant excepted.

The material parts of the judge's charge to the jury were as follows, the passages excepted to being printed in italics:

"Upon the testimony I charge you as follows: *The principal witness for the defendant was a man who was the section-master, that is, Mr. Smith. If there was a rotten tie there, and he had overlooked it, he would be strongly tempted to conceal it and put the fault on somebody else.* The superintendent was the agent of the road, but he testified he did not examine it. He saw the accident was caused by a broken rail. He was in a hurry to get off, and he did not examine it closely. *His testimony, therefore, does not amount to much* except to establish the fact that it was caused by a broken rail. What broke the rail he does not know. *If it was a bad cross-tie and it was the cause of the accident, why then the negligence of the road would be very great, or the negligence of the employés, because that was a thing anybody could see.* Three of the witnesses say that it was a bad cross-tie. You remember, with regard to these things, it is only a matter of opinion of these men. One says that it was a rusty place, as though it had lain on a rotten cross-tie. Another says, right at the place where it was broken there was a rotten cross-tie. Another stated the primary cause was a rotten cross-tie. Mr. Smith states that he went and worked on it and studied it, and he came to the conclusion that the rotten cross-tie had nothing to do with it, and he arrived at that conclusion from examining the different breaks, and deduced what was probably the result from them, he saying none of the brakes was under the decayed cross-tie. He is contradicted by one of the witnesses, who says that right under the place which was broken was a rotten cross-tie. *If the rotten cross tie was the primary cause, there was a plain, open case of negligence.* It would be their duty to look after it, and if that caused the broken rail and this man is damaged the company would be liable.

"But it is insisted by the company that the broken rail came from some secret defect. If you believe that to be true, and that secret defect could not have been ascertained by proper diligence—for every means must be used to detect it, especially in case of iron that is very old—if every means had been used to detect it, then the road is not liable. *If you put an old man to do a young man's work, you ought to be sure that the old man is sound; you ought to test him. And so, if you put an old rail forty years old, that has been run over by train after train for forty years, and put that to do the work of a piece of iron. I believe there is no testimony*

about the average age, but it is a question of universal notoriety that, as Mr. Smith said in his testimony, old rails are much more apt to break than new. If this rail had been here a long time, it was their duty to take extraordinary care. Now, what would that be? Not merely to look at it; you can do that with the very best kind of rails. They would have a man pass over there, as he says, two or three times a week, and look over everything. He does that with the very best kind of rails. When these rails get old and are liable to break, much closer care ought to be taken. *I would not be prepared to say what they ought to do in a case like this. If a rail be forty years old perhaps they ought to send a man around every day to hammer it. I do not say that this would be their duty. I suggest that to you for your consideration, because this is extraordinary to use a forty-years old rail. There is no evidence that they did anything more with that than they did with any other rail.* In this State the jury are judges of what the duty would be. I do not know what is the law of Mississippi, but as it is to be tried by Georgia law the jury are the judges,

"As to damages: 1st. There is the actual pecuniary damage; that is, the damage which can be computed with certainty, as, for instance, a doctor's bill; that can be computed with certainty, and that has been proven in this case to be $290. Also the loss of time can be computed. It did not appear whether this man lost anything or not by the loss of time—whether he lost his salary. The company would not be bound to pay him, perhaps, for his salary if he did not perform his duty. There might be actual damage for the loss of time if there has been any sustained, but you cannot imagine expenses unless they are proven. *In this case, so far as the salary is concerned, the presumption would be that he had lost his salary. That might be computed; but there is no evidence about it. What the truth is about that we do not know, but he having lost his time, the presumption is he lost his pay, and that would be another element of damage which you could ascertain with certainty.*

"2d. Then there is another kind of damage for which there may be compensation, and that is for the pain and suffering. In all these cases of serious injury money cannot pay for the pain and suffering. It only approaches to it; but he is entitled to some compensation for the pain and suffering. Now, that is left to the enlightened consciences of the jury.

"There is another element of damage, as claimed in this case, which is less certain; to wit, a kind of speculative damage, in which it is ascertained what a man would make at the time of the accident and what he was capable of making afterwards. To find out what he was capable of making, you must find out what he did make, and then how much his capacity to do his former duties was injured; and, having ascertained that, find out how old he is; then

find out how much he is damaged every year; and then find out from the table which you will have out before you how much $1 of annuity to the end of his expectation is worth, and multiply them together.

"As I said, all this is not very certain. You cannot ascertain it to a certainty for several reasons. No man can tell how long a man is going to live, but you can come close to it; you can tell how many out of ten thousand are going to die per year. You must only average it. A man who makes a good deal of money one day may get to be a drunkard, or his whole business may break down, as is often the case. His mode of life may change.

"Find out what that man is capable of making. His testimony is he had a salary of $3000, and he had a trade, to wit, an adjuster. That was his profession. He said he made $700 to $1000 as an adjuster. Now, you take this $3000 and what he could have made otherwise, what he has shown he did make otherwise, and find out what he did make in one year. Find out from the proof how much he has lost. There is his own testimony, and it is to be taken like the testimony of every other party at interest; his own testimony is he could not carry on his old business. It required an amount of exercise and travel which would be perfectly impossible for him to take, and he had to go back into a business by the month, where he could have an office and where he would be at expense. Under his contract there would be no expense; they paid his expenses. As an adjuster he had his expenses paid, and $10 a day. Now, in the new business he still keeps up a small business of adjuster. He gets $175 a month.

"I say to you that the kind of damage we are now discussing cannot be sure, certain. He may be damaged more or less now, next year he may be better. This is only one mode of arriving at it. You must take the whole thing together. He may get well. The doctors tell you the chances are that things of this sort are permanent. He may get well or he may not. Try to do what is right and just between the parties. You cannot be accurate as to this kind of damage; you can only approximate.

"Now if, under all these rules, you find the defendant is liable, then find the amount of his liability. In arriving at the amount of liability, as I said before, there are two things you must find: first, how much is the actual pecuniary damage he has sustained, the loss of the time and doctor's bill; second, his pain and suffering for the future; and, third, you will find out what he has been injured by the year. *The company is bound to give him an annuity of the amount he has been damaged by the year, for a period equal to the expectation of the plaintiff's life.* It would not do to say this: His expectation is thirty years, and he has lost $1000 a year, therefore we will give him $30,000; for the annuity will be payable one part this year and another part next year, and each of the thirty parts

payable each of the thirty years. You must have a sum such that when he dies it will all be used up at the end of thirty years." [The judge then directed the plaintiff's counsel to "mark the table that has got the calculation;" and, after the annuity table had been marked opposite forty-nine years of age, proceeded:] "Add to that the present worth of annuity if you find he was damaged. Find, gentlemen, a verdict, first, for the pecuniary damage; next, the pain, if he has suffered any; next the loss per year; multiply by the amount you find in that table, and add the three together, and your verdict would be just a general verdict for the amount found."

The jury returned a verdict for the plaintiff in the sum of $16,000, and the defendant brought the case to this court by writ of error.

Edgar M. Johnson (*George Hoadly* and *Edward Colston* were with him on the brief), for plaintiff in error.

Hoke Smith for plaintiff in error.

GRAY, J.—This was an action against a railroad corporation for personal injuries received on September 16, 1881, by a passenger, then forty-nine years of age. The verdict was for the plaintiff in the sum of $16,000, and the defendant tendered a bill of exceptions, and sued out this writ of error.

Some of the exceptions relate to rulings and instructions on the question of the defendant's liability, and others to the measure of damages. Those relating to the defendant's liability present no serious difficulty.

There being evidence tending to show that the accident was caused by a worn-out rail, it was, to say the least, within the discretion of the court to admit evidence that the general condition of that portion of the road which included the place where the accident occurred had long been bad, and that the rails had been in use for a great many years. Such evidence had some tendency to prove both that a worn-out rail was the cause of the accident, and that the defendant had neglected to repair the defect. The reports made by the superintendent to the board of directors in the course of his official duty were competent evidence, as against the corporation, of the condition of the road.

ADMISSION OF EVIDENCE AS TO CONDITION OF ROAD.

In the courts of the United States, as in those of England, from which our practice was derived, the judge, in submitting a case to the jury, may, at his discretion, whenever he thinks it necessary to assist them in arriving at a just conclusion, comment upon the evidence, call their attention to parts of it which he thinks important, and express his opinion upon the facts; and the expression of such opinion, when no rule of law is incorrectly stated, and all matters of fact are ultimately

POWER OF COURT TO COMMENT ON FACTS AND EVIDENCE.

submitted to the determination of the jury, cannot be reviewed on writ of error. Carver *v.* Jackson, 4 Pet. 1, 80; Magniac *v.* Thompson, 7 Pet. 348, 390; Mitchell *v.* Harmony, 13 How. 115, 131; Transportation Line *v.* Hope, 95 U. S. 297, 302; Taylor on Evidence (8th ed.), § 25. The powers of the courts of the United States in this respect are not controlled by the statutes of the State forbidding judges to express any opinion upon the facts. Nudd *v.* Burrows, 91 U. S. 426; Code of Georgia, § 3248. The exceptions to so much of the judge's charge as bore upon the liability of the defendant cannot therefore be sustained.

We are then brought to a consideration of the exceptions which relate to the evidence admitted and the instructions given upon the measure of damages.

In an action for a personal injury, the plaintiff is entitled to recover compensation, so far as it is susceptible of an estimate in money, for the loss and damage caused to him by the defendant's negligence, including not only expenses incurred for medical attendance, and a reasonable sum for his pain and suffering, but also a fair recompense for the loss of what he would otherwise have earned in his trade or profession, and has been deprived of the capacity of earning, by the wrongful act of the defendant. Wade *v.* Leroy, 20 How. 34; Nebraska City *v.* Campbell, 2 Black, 590; Ballou *v.* Farnum, 11 Allen, 73; New Jersey Express Co. *v.* Nichols, 3 Vroom, 166, and 4 Vroom, 430; Phillips *v.* London & Southwestern R., 4 Q. B. D. 406, 5 Q. B. D. 78, and 5 C. P. D. 280; s. c., 49 Law Journal (Q. B.), 233. MEASURE OF DAMAGES.

In order to assist the jury in making such an estimate, standard life and annuity tables, showing at any age the probable duration of life, and the present value of a life annuity, are competent evidence. The D. S. Gregory, 2 Benedict, 226, 239, affirmed 9 Wall. 513; Rowley *v.* London & Northwestern R., L. R. 8 Ex. 221; Sauter *v.* New York Central R., 66 N. Y. 50; McDonald *v.* Chicago & Northwestern R., 26 Iowa, 124, 140; Central R. *v.* Richards, 62 Georgia, 306. SAME—LIFE AND ANNUITY TABLES

But it has never been held that the rules to be derived from such tables or computations must be the absolute guides of the judgment and the conscience of the jury. On the contrary, in the important and much-considered case of Phillips *v.* London & Southwestern R., above cited, the judges strongly approved the usual practice of instructing the jury in general terms to award a fair and reasonable compensation, taking into consideration what the plaintiff's income would probably have been, how long it would have lasted, and all the contingencies to which it was liable; and as strongly deprecated undertaking to bind them by precise mathematical rules in deciding a question involving so many contingencies incapable of exact estimate or proof. See especially the opinions of Lord Justice Brett and Lord Justice Cotton, as reported

in 49 Law Journal (Q. B.) 237, 238, and less fully in 5 C. P. D. 291, 293.

In the present case, it was not suggested by the defendant at the trial that the life tables admitted in evidence were not standard tables, or not duly authenticated. The only ground assigned for the objection to their competency was that "the plaintiff had not shown a case in which such evidence is admissible, the plaintiff not having been killed permanently or disabled"—probably meaning "killed or permanently disabled." It is a sufficient answer to this objection that there was evidence from which the jury might conclude that the plaintiff's disability was permanent.

But the instructions on the measure of damages, to which exception was taken, cannot be approved.

INSTRUCTIONS ON MEASURE OF DAMAGES HELD ERRONEOUS.

Those instructions were, 1st, that the plaintiff having lost his time, the presumption would be that he lost his salary, and that would be an element of damage which the jury could ascertain with certainty; and, 2d, that the company was bound to give the plaintiff an annuity of the amount he had been damaged by the year, for a period equal to the expectation of his life.

As the judge directed the jury to add the worth of such an annuity at the time of the accident to the amount allowed for loss of time, including the loss of salary, it would seem that the jury were permitted, in making up their verdict, to take into consideration twice over the earnings lost by the plaintiff between the time of the accident and the time of the trial.

But the second instruction is open to the more serious objection of requiring the jury, in estimating the loss of future income, to compute the average amount of injury to the plaintiff's capacity each year, even if they should be satisfied, on the evidence before them, that the effect of that injury would vary from year to year, and would be either greater or less as time went on.

A reference to the rest of the charge rather strengthens than removes this objection. At the beginning of that part of the charge which relates to this subject, the judge told the jury "to find out what he was capable of making, you must find out what he did make, and then how much his capacity to do his former duties was injured; and, having ascertained that, find out how old he is; then find out how much he is damaged every year, and then find out from the table which you will have out before you how much $1 of annuity to the end of his expectation is worth, and multiply the three together." In the last paragraph of the charge, just before the sentence excepted to, the judge told the jury that, in arriving at the amount of liability, they must "find out what he has been injured by the year." And finally, after causing the annuity table to be marked opposite forty-nine years of age, he directed the jury "to find a verdict, first, for the pecuniary dam-

age; next, the pain, if he has suffered any; next, the loss per year; multiply by the amount you find in that table, and add the three together."

The natural, if not the necessary, effect of these peremptory instructions at the beginning and end of dealing with this matter would be to lead the jury to understand that they must accept the tables as affording the rule for the principal elements of their computation, and to create an impression on their minds, which would not be removed by the incidental observation of the judge, when speaking of the possibility of the plaintiff's getting well—"This is only one mode of arriving at it;" especially, as it was nowhere, throughout the charge, suggested to the jury that they would be at liberty, if they found difficulty in following the mathematical rules prescribed to them, to estimate the loss of income according to their own judgment.

Life and annuity tables are framed upon the basis of the average duration of the lives of a great number of persons. But what the jury in this case had to consider was the probable duration of this plaintiff's life, and of the injury to his capacity to earn his livelihood. Upon the evidence before them, it was a controverted question whether that injury would be temporary or permanent. The instruction excepted to, either taken by itself or in connection with the whole charge, tended to mislead the jury, by obliging them to ascertain the average injury to the plaintiff's capacity by the year, whether the extent of that injury would be constant or varying; and by giving them to understand that the tables were not merely competent evidence of the average duration of human life, and of the present value of life annuities, but furnished absolute rules which the law required them to apply in estimating the probable duration of the plaintiff's life, and the extent of the injury which he had suffered. For this reason, the judgment is reversed, and the case remanded to the Circuit Court, with directions to set aside the verdict and to order a new trial.

See Hipsley *v.* Kansas City, etc., R. Co. and note, *ante*, p. 287.

Derailment From Defective Track—Evidence as to Condition of Road.—In an action brought to recover for personal injuries caused by the defendant's car, in which the plaintiff was a passenger, running off the track, alleged to have occurred by reason of the defective condition of such track, it was *held* that the admission of evidence, on behalf of the plaintiff, of the condition of the road at a point at a half mile distant from the place of accident and evidence that repairs had been subsequently made at points in the neighborhood of the accident, was erroneous. Reed *v.* New York Central R. Co., 45 N. Y. 574.

In a recent case, Anthony *v.* Louisville & N. R. Co. (C. C. E. D., Mo., March, 1886), 27 Fed. Reptr. 724, the car in which the plaintiff was riding was thrown from the track, and he received severe bodily injury. The defendant denied negligence, and alleged that the car in which plaintiff was riding when hurt was thrown from the track by a rail broken by the preceding cars of the train, and that the rail broke because of a concealed defect which

could not have been discovered by inspection. In charging the jury, Treat, J., said: "This case has seemed to the court all the way through to turn on one question, mainly, viz., the character of the rail. Was it a rail not fit to be used, and could the company have known it, for the purposes for which it was used? If it could, the company was liable for the injury that was caused by the use of such an improper rail. Second, if it were originally fit for the purposes used, and through some cause or other it had become defective, and the company could have detected that defect, and the injury was caused, still the company is liable.

"Ordinarily, as stated by the witnesses here, under our modern contrivances for safety, rails on a track are not only fastened by what are known as 'chairs' and 'ties,' but also by fish-plates. I endeavored to ascertain, if possible, the condition of these fish-plates, so that after the accident it might be determined whether there were fish-plates at either end of this short rail. It is for you to say with regard to that. It does not become the court to comment on the testimony. It must suffice for the purposes of this case, so far as the court is concerned, that this accident happened. You have heard the testimony as to how it happened. You have heard the effect upon this rail, broken into sections of several pieces; and if that rail was fit for the work, and the exercise of the highest degree of care and attention on the part of this railroad would not have enabled it to detect that it was unfit, as it turned out to be, then the company is not liable. If it was unfit, and they knew it, or by extreme care and skill could have found that it was unfit when the injury occurred, then the company is liable. So, practically, the question is, was this a latent defect, which could not be detected by the company? If it was, the company is not liable; if it were otherwise, then the company is liable."

CENTRAL R.

v.

SANDERS.

(73 *Georgia*, 513.)

Where an action was brought against "the Central R. and Banking Co.," and interrogatories were taken out, crossed and executed, the name of the defendant being so stated in them, and subsequently the declaration was amended by inserting after the name of the defendant the words "of Georgia, lessees of the Southwestern R. Co." the interrogatories previously executed were not thereby rendered inadmissible.

Whether interrogatories should have been suppressed or not, if the question of the amount of damages, to which alone they related, is waived, the ruling of the court as to the interrogatories is immaterial.

Where one is injured by the running of a car and engine of a railroad company, the law presumes that such injury was the result of negligence on the part of the company, and to relieve itself of such presumption, it must show that it used all ordinary care and diligence to prevent the injury. It is not enough for them to insist that they do not know how the accident occurred, and that it is impossible for them to find out.

It appeared in this case that the company did not have a suitable track; that the outside of the curve where the accident occurred was lower than the inside; and that the train was behind time and was running rapidly to catch up when the train left the track, causing the injury sued for. A verdict for the plaintiff was, therefore, not without evidence of negligence to support it.

BEFORE Judge CLARKE. Quitman Superior Court.

Georgia Saunders brought suit against the Central R. for a personal injury, laying her damages at ten thousand dollars. The defendant pleaded the general issue. On the trial there was no conflict of evidence as to the fact that a train on the Southwestern R. (which was controlled by the Central R. under lease) ran off the track while passing around a curve, and that the plaintiff was injured; but the evidence as to the diligence or negligence of the railroad was voluminous and conflicting. It is unnecessary to set it out in detail, but it is sufficient to state that the principal points relied on by the plaintiff were as follows: The train was seven or eight miles behind its schedule time just before reaching the curve, and was running more rapidly than the schedule time, in order to catch up. It left the track on the outer side of the curve, tearing away the rail and stringers on which it rested for a distance of fifty to seventy-five yards. The track and the wreck were examined shortly after the accident. In one of the stringers a crack was found extending nearly half way through it, and along the edges of the stringers were some rotten places. A witness for the plaintiff testified that, from his examination, he was of the opinion that the cause of the accident was that the outer side of the curve was lower than the inner side, while the contrary should have been the case. Another witness testified that he examined the track the next day, and that the outside of the curve was two and a half or three inches lower than the inside; that the track had been temporarily repaired, and he, being in the employment of the road, went there to repair it. There was testimony that the supervisor of the road was at the place of the injury after it occurrence; that he appeared to have been drinking, and indulged in some profanity and abuse of the conductor, saying that it was carelessness and looked like he had been running thirty miles an hour. (These sayings of the supervisor appear to have been admitted for the purpose of impeaching him.) There was also evidence as to the extent of the injury.

The principal points of contest relied on by the defendant were as follows: The track at that point was properly laid with good material. It had recently been repaired, and several agents and employés of the road testified that they had been over that portion of the track shortly before the injury, and that it appeared to be in good condition. While the speed was somewhat faster than the schedule time, it was not an unusual or dangerous speed; and the track being in good condition, there was no more danger of an ac-

cident in running around a curve than on a straight track. The stringers were sound and the rails good. The crack in one of the stringers was a mere sun-crack, and it was not in an unsound condition. The tearing up or splintering of timbers was such as might have occurred as the result of such an accident wherever it happened and however sound the rails may have been. One witness testified that where a track was in good condition, it could not be told what caused the accident, and that he had seen accidents on straight lines as well as on curves. The engineer testified that his engine was in good condition, and he thought the cars jerked it from the track. Another witness testified that the cars were in good condition. Several other trains had passed over that portion of the road on the day when the injury occurred, and had the outer rail been lower than the inner one, they would have left the track.

There was some conflicting evidence as to the putting in of a short stringer in one portion of the curve, and as to whether it was put in before or after the injury, but it appeared that it was not at the exact point where the train left the track.

The jury found for the plaintiff $2500. Defendant moved for a new trial, which was refused, and it excepted.

W. S. Wallace & Son for plaintiff in error.

T. H. Pickett; J. H. Guerry, by *C. B. Wooten*, for defendant.

BLANDFORD, J.—The defendant in error brought her action against the plaintiff in error and obtained a verdict and judgment. The defendant moved for a new trial on various grounds, which motion was overruled by the court below, and defendant excepted, and error thereon is assigned to this court.

1. The action was originally brought against the Central R. and Banking Co. The declaration was subsequently amended, without objection, by adding the words, after "Central R. and Banking Co.," "of Georgia, lessees of the Southwestern R. Co." While the action remained against the Central R. and Banking Co., and before amendment, certain interrogatories were sued out for Georgia Sanders and others, and the case was stated on the interrogatories as it appeared originally in the declaration. The declaration having been amended as above stated, when the depositions were returned into court, counsel for plaintiff in error moved to suppress the same, upon the ground that when the interrogatories were sued out, there was no case against the plaintiff in error in court. This motion was refused by the court below, and this forms the first ground of complaint by plaintiff in error.

MISNOMER AMENDMENT TO TITLE OF DEFENDANT.

When the declaration was amended there was a good case against the defendant. This amendment was more formal than real; the misnomer was so amended as to make the declaration speak the truth as to the name of defendant. The defendant was fully

advised by the interrogatories of plaintiff as to the case the witness was to be examined about. The questions were full, and the crosses of defendant were likewsie full as to all matters embraced therein. We think the testimony was admissible, and the court did right to refuse to suppress the same. See Wright *v.* Zeigler Bros., 70 Ga. 502.

2. The defendant moved to suppress other interrogatories, after the amendment to plaintiff's declaration had been made, on account of some informality as to the statement of the case in the interrogatories. Whatever merit there may have been in this motion when made, the plaintiff in error having waived the ground in its motion for new trial that the verdict was excessive, and as this testimony goes alone to the injuries received by plaintiff, which bears alone upon the question of damages, the ruling of the court below on this motion, whether right or wrong, is quite immaterial; and if wrong, under the present aspect of the case, would not work a reversal.

SUPPRESSION OF INTERROGATORIES.

3. It is insisted by the able and ingenious counsel for plaintiff in error that the verdict is not supported by the evidence. When one is injured by the running of the cars and engines of a railroad company, the law presumes that such injury was the result of negligence of the the railroad company, and such company to relieve itself of such presumption, must show that it used all ordinary care and diligence to have prevented the injury. It is admitted by counsel for plaintiff in error that the company did not know how this accident occurred; that it is impossible to find out. But we submit that, notwithstanding the ignorance of the company as to the cause of the accident, the presumption still exists of negligence on its part. The defendant must show, to rebut the presumption, that it used all ordinary care and diligence.

PRESUMPTION OF NEGLIGENCE—VERDICT SUPPORTED BY THE EVIDENCE.

This record shows affirmatively that the company was negligent in not having a suitable track; that the outside of the curve was lower than the inside; that the train was behind its time and was running rapidly to make up; all these things were in evidence and submitted to the jury. The judge who tried this case was satisfied with the verdict—at least, he refused to interfere with the same. Where there is evidence to support the verdict, and the judge who tries the case refuses to grant a new trial, this court will not interfere.

Judgment affirmed.

See Hipsley *v.* Kansas City, etc., R. Co. *supra;* Vicksburg, etc., R. Co. *v.* Putnam *supra.*

CENTRAL R.

v.

SENN.

(73 *Georgia*, 705.)

In an action for damages brought by a passenger against a railroad company, for injuries which plaintiff sustained by the cars, on which she was a passenger, running off the track, which was alleged to have been caused by the carelessness and negligence of the company in the construction of its track and the running of its cars, the plaintiff being introduced as a witness in her own behalf, should not be allowed to state how much, in her opinion, was her loss by her inability to labor. The witness cannot give an opinion as to the amount of the damages, but must state facts, and let the jury say from the facts what is the amount of the damages.

Upon the trial of such a case, any witness may give an opinion as to what caused the train to run off the track, provided the witness states the reasons upon which the opinion is predicated. One who is an expert may give an opinion without stating his reasons.

It is a general rule that, wherever an expert can give an opinion without the reasons upon which it is based, any other witness, who knows facts upon which he can form an opinion, may state his opinion, by giving the facts upon which he bases it.

In an action against a railroad company for damages to the plaintiff, caused by the car, upon which she was a passenger, running off the track, and where damages are claimed, both for physical pain and suffering from wounds received by her, and also on account of loss of business and inability to labor, it is error for the court to charge the jury in the following language, without any qualification: "In some torts the entire injury is to the peace, happiness and feelings of the plaintiff. In such cases, no measure of damages can be prescribed, except the enlightened conscience of impartial jurors."

Where the entire charge is not sent up in the bill of exceptions or in the record, and the portion of the charge excepted to is error, without qualification, and when the judge who tried the case makes no statement in his certificate which shows that it was qualified by other parts of the charge, this court will presume that there was no qualification.

BEFORE Judge WILLIS. Muscogee Superior Court.

To the report contained in the decision, it is only necessary to add, in connection with the second and third divisions thereof, the following grounds of the motion for new trial:

(3.) Because the court permitted Domingoes, a witness for the plaintiff, in rebuttal, after stating that he was not an expert, and testifying that before the run-off there was a jerking, bounding sensation, so that one could hardly walk in the car, but that he did not go back and look at the track after the accident, and that there had been some conversation excited by the motion and jerking, and giving his reasons for the opinion, to testify that from what he saw and felt, his opinion was as follows: "I think, sir, on a curve, when the car is running, the centrifugal force of the flange of the

wheel against the iron rail is increased by the increase of the speed. We were running very fast, and my opinion is that the pressure must have been very great in consequence. Our sensation was not a rolling, but was a bounding; it gave the opinion to me that we had not mounted the track, but that the track had spread and we were between; and my opinion is that the speed we were going at forced the track apart and caused the run-off."

(4.) Because the court refused to rule out this testimony, on motion made therefor, on the ground that "such opinion was founded upon an assumption of the condition of the track being defective—whereas the said witness had, during said examination, testified that he did not know what the condition of the track was—and upon a theory given by the witness when he had also testified that he did not scientifically understand, and because such opinion was not given on facts."

(5.) Because the court permitted Clement, a witness for the plaintiff, not an expert, after giving his reasons for his opinion, to testify that "the train was running a curve, and the outside rail gave way and threw the car from the track." Objected to as being matter of opinion.

(6.) Because the court permitted Hatcher, a witness for the plaintiff, in rebuttal, in answer to a question, to state to the jury what he found upon examination of the track after the cars had run off, and as to the condition of the track, and having given the facts, then to state his opinion as to what caused the cars to run off, to testify as follows: "My opinion of it is this, that from the compression of that end of the rail it raised that, and the wheel struck it, and this gave way, because I saw evidences of a mark there; and if the railroad were to bring in the old rail, it would show for itself—the one towards Macon, right at the joint though; but I will say that, for a short distance, I would say probably the distance of a coach, it had the evidences of where it had run across the cross-ties; and my theory was that the wheel struck that and ran off—one of the front wheels—and threw the balance of the coach off before the balance of the wheels got to it, and my opinion of the cause of it is the broken bar. I don't know of any other reason." Objected to as matter of opinion.

(7.) Because the court permitted Reese, a witness, for the plaintiff, in rebuttal, to testify as follows: "I did examine the track where the run-off occurred, and I was on the train at the time of the run-off, and my opinion is that the car running so fast, and that fish-bar being broken at that point, the track gave way and spread, and that caused this run-off." Objected to as matter of opinion.

W. S. Wallace and *Peabody & Brannon* for plaintiff in error.

Wm. A. Little and *W. T. Gary* for defendant.

BROWN, J.—This was an action brought in Muscogee Superior

Court by Nancy E. Senn against the Central R. and Banking Co., as lessees of the Southwestern R., to recover damages sustained by the plaintiff by reason of the car, on which she was a passenger, being thrown from the track. It was alleged by the plaintiff that the injury was caused by the negligence and carelessness of the defendant in the construction of its track and running of its cars at an unusual and dangerous speed. She claimed that, by reason of wounds, bruises and other injuries which she received that she suffered great physical pain; that she paid out large sums of money for physicians' bills and other expenses; that she was disfigured by a scar on her face. She also claimed to have been damaged by the loss of business, and inability to labor and attend to business, and that her injuries are of a permanent nature.

FACTS.

On the trial of the case, the defendant admitted that the Central R. and Banking Co. were lessees of the Southwestern R., and were in possession and operating the same as common carriers for hire at the time the injuries were sustained.

The defendant denied that there was negligence or carelessness in the construction of the track or running of the cars, and insisted that the track was well constructed, and that they were running at a safe rate of speed at the time the accident occurred.

The jury found a verdict for the plaintiff for $10,000, and the defendant moved for a new trial on eleven different grounds, which motion the court below overruled, and refused a new trial, and that ruling is assigned as error, and the case brought by bill of exceptions to this court for review.

In the view we take of this case, it will not be necessary for us to notice specifically all the alleged grounds of error as set out in the motion for a new trial. We will therefore content ourselves by referring to such of them as we think control the case made by the record.

1. The first and second grounds in the motion will be considered together. The first ground is as follows: Because the plaintiff, being introduced as a witness in her own behalf, was asked by her counsel, in the direct examination, the following question, to wit (the witness having first given the reasons upon which her opinion was based, as set forth in the brief of testimony): "What did you consider your business worth to you per year at the time you were injured?" To which question the defendant, by its counsel, objected, upon the grounds that this was not a proper rule to estimate the amount of damages sustained, and the court overruled the objection and allowed the witness to testify, and she did testify in answer thereto, "I made $1,500, after keeping up my expenses."

DAMAGES—OPINION OF PARTY INJURED.

The second ground in the motion for a new trial is in the following words: Because, whilst the plaintiff was a witness in her own

behalf, she was asked by her counsel upon the direct examination (the witness having first stated the reasons upon which her opinion was based, as set forth in the brief of evidence): "How much, in your opinion, a year is your loss by your inability to labor?" And the defendant, by its counsel, objected thereto, upon the ground that the same was a mere guess and conclusion of the witness, and the court overruled the objection and allowed the witness to testify, and she did testify in answer thereto, "Well, I had $1500 clear the year that I was hurt. I have just kept even since. I would say my loss is $1500."

In cases of this character, the rule is well settled, both in our standard works on evidence and by adjudicated cases, that witnesses, whether parties to the case or not, cannot give their opinions as to the amount of damages the plaintiff has sustained. They must state facts, and not mere opinions, and the jury must be left free to make up their own opinion of the damages from the facts testified to by the witnesses. 9 Meeson & Welsby, 710; 1 Sedgwick on Damages, 553; 47 Ga. 546; 18 Wis. 74. The plaintiff may prove all the facts and circumstances which would shed light upon the question and enable the jury to arrive at the true amount of damages actually sustained. In this case, she might show the character of her business, her ability to labor and attend to business at the time of the injury, how she was injured, and what has been her ability to labor and transact business since the injury, and every other fact which would show that she was damaged in her business by reason of her inability to labor; and the jury, with all the facts before them, should make up their own opinion from the facts as to the amount of the damages.

In this case, the plaintiff seems to have made up the opinion which she was allowed to give from the fact that she made $1500 the year she was hurt, and since that time she has only made expenses. This, at best, would be a very uncertain mode of arriving at the damages. There are so many other causes which might increase or diminish the profits in a business such as that in which she was engaged that it would be difficult to tell how much her injuries and how much other causes contributed to her losses. Much might depend upon the number of trains that stopped at her house for meals, the amount of travel and of competition, the price of provisions, and a hundred other causes. It often happens that a merchant or boarding-house keeper makes a large amount of money some years, and other years runs the same kind of business with as much ability to labor and makes nothing. Be this as it may, however, we think she ought not to have been allowed to give her opinion as to the amount of her damages, it matters not upon what facts she based her opinion.

2, 3. We see no error in the ruling of the court upon the third, fourth, fifth, sixth and seventh grounds of the motion. The wit-

nesses were allowed, over the objection of counsel for plaintiff in error, to give their opinions as to what caused the cars to run off the track, by stating the facts upon which they based their opinions.

We think this ruling in accordance with a well-established rule of evidence, and that it was not error for the court to permit these witnesses, who were present, and felt the motion of the train, or examined the wreck and saw the surroundings, the condition of the track and of the fish-bars, the number of spikes by which they were held, the marks on the rails, or other facts from which they could form an opinion as to the cause of the run-off, to state such opinions, provided they stated the reasons on which they were based. An expert may give his opinion without stating the reasons therefor, but one who is not an expert may give his opinion, accompanied with the reasons. It is a very general rule that, wherever an expert can give an opinion without the reasons, that one who is not an expert can give an opinion with the reasons.

OPINION EVIDENCE—EXPERT TESTIMONY.

The objection to such evidence goes to its weight, and not to its admissibility. The credibility of all evidence depends not only upon the character of the witnesses for truth, honesty and integrity, but also upon the knowledge the witness has of the facts and subject matter about which he testifies; and this is more especially true where witnesses are allowed to give their opinions upon any subject. If it appears that a witness knows but little of the matter about which he testifies, and that from such want of knowledge he is unable to support his opinion by good reasons, the opinion of such a witness would and ought to have but little weight with the jury; while, if he showed that he was very familiar with the subject, and supported his opinion by strong reasons, the jury would give the opinion of such a witness more weight. But in either case it goes to the weight of the evidence, and not to its admissibility. We do not mean to say that a witness could give an opinion upon mere hearsay; he must know the facts which he states as reasons for his opinion. An expert may give an opinion upon a state of facts testified to by other witnesses.

4. The eighth ground of the motion for a new trial is as follows: Because the court charged the jury in the following language: "In some torts, the entire injury is to the peace, happiness and feelings of the plaintiff. In such cases, no measure of damages can be prescribed, except the enlightened conscience of impartial jurors."

INSTRUCTION CONCERNING MEASURE OF DAMAGES.

We think this charge given, so far as the record shows, without qualification, was not applicable to the facts of the case, and was therefore error. Section 3067 of our Code, from which this charge was taken, or at least the law embraced in said section, was probably

intended to apply to cases where one party injured another from motives of malice, and the injury was of such a character that the damage resulting therefrom could not be estimated by any other rule; as, for instance, where one man spat in the face of another, and other injuries of like character. But since this court has held that, in a case like the one at bar, the plaintiff may recover not only the actual damage sustained by reason of expenses incurred and by loss of business and ability to labor, but that he may also recover damages for the physical pain and suffering which he endured.

The charge, as given in this case, would seem to be applicable to that part of the damage which plaintiff may have sustained by reason of the physical pain which she suffered.

The charge as given was calculated to mislead the jury and induce them to believe that the whole case was thrown open to them, and that they had the right to fix the damages according to their enlightened consciences, without regard to the actual damages which were shown by the evidence.

The court should, at least, have qualified this charge by instructing the jury that, so far as the expenses incurred by plaintiff for medical attention and other expenses of like character were concerned, and so far as she was damaged by loss of time, inability to labor and to attend to business, if they found for the plaintiff they should find the actual damage sustained by her, as shown by the evidence, and that they might add to that such sum as damage for the physical pain suffered by the plaintiff, and other injuries of that character where the actual damage cannot be ascertained by any rule of evidence as in their enlightened conscience they might think reasonable and just.

5. It was insisted before the court in the argument of this case, that if the entire charge had been sent up it would have shown that the portion of the charge excepted to by the plaintiff in error was qualified, so as to meet and obviate the objection made to the part which appears in the bill of exceptions, and that may be true; but where a portion of the charge is excepted to, and there is nothing in the record or the presiding judge's certificate to show that the charge which appears was qualified, this court will presume that there was no such qualification.

As this case goes back for a new trial, we express no opinion upon its merits, or upon the amount of damage plaintiff is entitled to recover, if entitled to recover at all. Let the judgment of the court below be reversed and a new trial granted.

Judgment reversed.

Opinion Evidence as to Amount of Damages not Admissible.—See Houston, etc., R. Co. *v.* Burke, 9 Am. & Eng. R. R. Cas. 59.

Louisville, New Albany & Chicago R. Co.

v.

Pedigo.

(*Advance Case, Indiana. October* 12, 1886.)

In an action by a passenger against a railroad company to recover for injuries resulting from the breaking down of a bridge, it is competent to prove the rate of speed at which the train ran upon the bridge.

It is not error to reject interrogatories addressed to a jury which seek to elicit a conclusion of law.

The presumption of negligence arising from an injury to a passenger by the falling of a bridge is not rebutted by evidence that the carrier was using the means and appliances ordinarily used, without also showing that they were sufficient for the purpose, were properly used, and were without known or discoverable defects.

Carriers of passengers do not warrant the safety of passengers, but they are held to the highest degree of practical care.

Appeal from the Marion Superior Court.

Geo. W. Easley and *Wm. Irwin*, for appellant.

Van Vorhis & Spencer, *Charlton & Lockhart*, and *J. O. Pedigo*, for appellee.

Mitchell, J.—This action was brought by Pedigo against the railway company to recover damages for personal injuries alleged to have been suffered by him on January 31, 1884, at Broad Ripple, near the city of Indianapolis, while being carried as a passenger on one of the company's trains. The injury is alleged to have been sustained, without the plaintiff's fault, by the breaking down of a railway bridge, negligently maintained by the company over White river. In consequence of the fall of the bridge, the car in which the plaintiff was seated was thrown into the river below. The plaintiff has judgment in the court below for $4,500. A reversal of this judgment is now asked upon various errors assigned.

Facts.

In the order in which the questions have been presented the first ground upon which a reversal is asked involves a ruling of the court in admitting certain testimony concerning the rate of speed at which the train was proceeding when the disaster occurred. The conductor of the train, having been examined as a witness on behalf of the defendant, was asked, on cross-examination, the following questions: "How fast was the train running when it struck the bridge?" Over objection, he was permitted to give the following answer: "From 15 to 18 miles an hour." Another witness who was engaged in making repairs to the bridge at the

time it fell, having testified on the defendant's behalf, was asked on cross-examination whether he had not said to a person named, at the time and place mentioned, that the supports which held the bridge when the train came upon it would have been sufficient but for the high rate of speed at which the train was going. The witness answered, over objection: "I might have told him that. . . . I said that I believed the train was running faster than it ought to over the bridge."

ADMISSION OF EVIDENCE CONCERNING SPEED OF TRAIN.

The appellant's argument is that, as there was no allegation in the complaint that the train was run at a negligent rate of speed, the admitted evidence was outside of any issue in the case, and that hence the ruling was both erroneous and hurtful. This view of the question is not tenable. While the complaint contains no such allegation as that referred to, it is charged therein that, at the time the train ran onto the bridge, it was "wholly and entirely unsafe and dangerous to run an engine and train over the same," on account of its insecure and defective condition, growing out of defects in its original construction, and because of the negligent and unskilful manner in which repairs upon it were being prosecuted. The issue, thus tendered, made any evidence relating to the condition of the bridge at the time it fell, the manner in which it was supported during the process of repairment then going on, the weight of the train, and the speed at which it was being run, competent as part of the *res gestæ*. If, owing to the condition of the bridge, it was dangerous to run an engine and train upon it at all, it might evince a degree of negligence bordering upon recklessness if the train was run upon it at such a rate of speed as to multiply the probabilities that the bridge would fall. If the bridge was not supported while undergoing repairs so as to sustain the weight of the train at the rate of speed at which the company saw fit to run it, the company was negligent in the maintenance of its bridge. Grant that trains must be run over bridges while they are undergoing repairs, the duty of the company nevertheless is to so adjust the bridge, and regulate the speed of overpassing trains, as that the lives of passengers will not be put in peril.

REJECTION OF INTERROGATORIES—NOT ERROR IF IMMATERIAL.

The next ground upon which a reversal is asked is that the court below refused to submit to the jury the sixth, seventh, eighth, and ninth special interrogatories propounded by the appellant. These were as follows: "Interrogatory No. 6. Do you find from the evidence that the employees of said defendants, engaged in putting thimbles or tubes into the chords of said bridge, were negligent in the means used or process of putting such tubes or thimbles in the bridge? Int. No. 7. If your answer to interrogatory No. 6 is yea, in what did the negligence consist? Int. No. 8. Do you find from the evidence that the employees of defendant, engaged in

putting thimbles or tubes in the chords of the bridge, used the same means, appliances, and mode that are ordinarily used by other railway companies in doing like work, under like circumstances? Int. No. 9. If you answer interrogatory No. 8 in the negative, state from the evidence what difference there was in the means, appliances, or mode used by the defendant and other railway companies doing like work under like circumstances."

The ruling of the court in rejecting the foregoing interrogatories was correct. The sixth and seventh were nothing more nor less than an invitation to the jury to express an opinion upon a question of law involved in the case. That it was not their function to do this has been determined in a number of cases. Pittsburgh, etc., Co. *v.* Spencer, 98 Ind. 186; Toledo, etc., Co. *v.* Goddard, 25 Ind, 185; Woolery *v.* Louisville, etc., Co. *ante* 223 (present term), and cases cited. Such questions of fact, if any there be, as are included in the eighth and ninth interrogatories, are so intermixed with assumptions and other matters, to which an answer would be nothing more than a conclusion of an uncertain character, as renders the propriety of the ruling of the court manifest. It was of no consequence whether the appellant used the means and appliances ordinarily used by other railway companies under the circumstances or not, provided they were used in such a manner as to render the bridge unsafe when the train came upon it at the rate of speed shown in this case. Means and appliances for repairing railway bridges which are so employed as that, when a train-load of passengers comes upon a bridge undergoing repairs, both train and passengers are precipitated into the river below, are either so manifestly insufficient, or are being so unskilfully used, as that, without showing some other cause for the disaster, against which the highest degree of practical skill and foresight could not have guarded, the company is liable to the imputation of negligence. When an accident happens such as that from which the alleged injury resulted, it is not sufficient to rebut the presumption of negligence, which the law raises in favor of a passenger, that the carrier is able to show that it was using the means and appliances ordinarily employed, without also showing that such means and appliances are ordinarily sufficient for the purpose, and that they were without known or discoverable defect, used in a proper and skilful manner. However the interrogatories under consideration might have been answered, the answers could have had no influence on the general verdict. Whenever it is apparent that such will be the effect of answers, it is not only proper, but it is the duty of the court trying the cause to reject interrogatories which unite such answers.

Among other instructions requested by the appellant, and refused by the court, the sixth was to the effect that the law does not require of railway companies the utmost degree of care which

the mind can conceive or imagine; or that they should be regarded as guarantors or insurers of the safety of passengers, or of the sufficiency of their roadways, bridges, and appliances, but that the observance of the degree of care exercised by reasonably cautious persons engaged in like service, under like circumstances, filled the measure of their obligation. The instruction proceeded further to state, in effect, that if the jury believed that the means and appliances which were being used in repairing the bridge at the time of the disaster were the same as those used by reasonably prudent persons engaged in like work, under like circumstances, then the defendant could not be found guilty of negligence, and the jury should return a verdict for the defendant. It is contended that this instruction is within the rule announced in Cleveland, etc., Ry. Co. *v.* Newell, 104 Ind. 264; s. c., 23 Am. Eng. R. R. Cas. 492.

INSTRUCTION TO JURY—DEGREE OF CARE REQUIRED.

Speaking of the duty which the law imposes upon a railway in respect to the maintenance of its track in the case cited, we said: "While its obligation does not rise to the degree of warranting the safety of its track and roadway, the law nevertheless exacts that, when an injury occurs to a passenger by an occurrence so unusual and so perilous of human life, it shall be made to appear that the utmost practical care and diligence have been observed, and that no degree of care usually and practically applicable to the careful management of like railways would have discovered the defect which probably caused the accident, and thus prevented its occurrence. "Conceding the substantial accuracy of so much of the instruction asked as defines the obligation of a railway company, in respect to its not being required to observe a merely speculative or imaginary degree of caution, or to insure either the safety of passengers or the sufficiency of its bridges, that part of it upon which the jury were asked to predicate a verdict for the defendant falls immeasurably short of the rule announced in the case relied on. It was not sufficient that the appellant may have used proper means and appliances in the repair of its bridge. The necessity of the case required it to show that, in the use of those means, "the utmost practical care and diligence have been observed, and that no degree of care usually and practically applicable to the work about which it was engaged would have discovered" the probable cause of the disaster, and prevented its occurrence. The instruction was properly refused.

In the fifth instruction given by the court, the jury were directed, in substance, that if they should find from the evidence that, while the railroad company's bridge over White river was undergoing repairs, its servants caused the train on which the plaintiff was a passenger to be drawn upon the bridge, and the injury to the plaintiff occurred, without fault on his part, by reason of the bridge giving way, and causing the car in which the plaintiff was

seated to fall through, their verdict should be for the plaintiff, unless they should further find from the evidence that in making the repairs the defendant's servants exercised the "skill, care, and prudence which skilled, cautious, and prudent persons would and ought to use" in order to have the bridge in a condition of safety for the passage of trains, and that it was not guilty of the slightest neglect in the use of proper and suitable means and appliances to protect said bridge, and prevent its giving way or breaking down. The objections made to this instruction relate more to the aptness of the language employed by the event than to the propriety of the principles announced. The law was, however, stated with substantial accuracy, in a manner to be clearly comprehended by the jury. Within the ruling in cases closely analogous, there was no error in giving the instruction complained of. Bedford, etc., R. Co. *v.* Rainbolt, 99 Ind. 559, and cases cited; Cleveland, etc. Newell, *supra;* Louisville, etc., Ry. Co. *v.* Thompson, *infra*, present term.

The only other question presented in such manner as to require notice relates to the amount of damages assessed. It is insisted that the amount is excessive. As, however, nothing appears to induce the belief that the jury must have acted from prejudice, partiality, or other improper motive in the assessment of damages, we cannot disturb their verdict. It was their exclusive province to determine the amount of compensation to be awarded for the injury sustained by the plaintiff, and, having determined it, so far as we can judge, upon the evidence, without the intervention of improper motives the court cannot interfere. Ohio & M. R. Co. *v.* Collarn, 73 Ind. 261.

Judgment affirmed, with costs.

Negligence in the Construction of Bridges.—In an action against a railroad company to recover damages for causing the death of a passenger, the evidence showed that by reason of the giving away of the bridge the accident occurred. Plaintiffs, in opening, gave direct evidence of faults and negligence in the construction of the bridge; that the injuries occurred by reason of the washing away of the embankment forming the eastern approach to the bridge; that this embankment had been carried out from the eastern bank into the deepest part of the channel; that it was composed of light and unsubstantial material, liable to yield to the action of the water; that at the time of the construction of the bridge there existed indications of a previous flow of waters there, and that the attention of the engineers was called to these circumstances. After the defendant had closed its evidence, which was directed to show, among other things, that no such indications of a previous flow of water there existed at the time of the construction of the bridge, or afterward, the plaintiff was permitted to call a witness to show at the time of the construction of the bridge there were saplings growing upon the low ground in the immediate vicinity of the bridge, and that to the distance of two or three feet from the ground these saplings bore water marks. *Held*, that due diligence required an inquiry and examination as to its character and the declivity of the circumjacent country, to ascertain the quantity of water likely to flow there in the future; that if indications ex-

isted in the vicinity of former floods, *e. g.*, driftwood and the like in the branches of bushes, or water-marks upon the trunks of trees, it was gross negligence to construct the bridge with its approach of light and unsubstantial soil, reaching into the water-way. Kansas Pacific R. Co. *v.* Miller, 2 Col. 442. In an action by a passenger against a railway company for compensation on account of injuries sustained by the breaking down of a bridge on the line, alleged to have been properly made, but which had been constructed under the superintendence of a competent engineer, the judge directed the jury that the question for them to consider was whether the bridge had been constructed and maintained with sufficient care and skill, and of reasonably proper strength with regard to the purpose for which it was made. *Held*, that the direction was right. Grote *v.* Chester & Holyhead R. Co., 5 Eng. R. R. & Canal Cas. 649; Same *v.* Same, 2 Welsby, Hurlstone & Gordon (Exchequer), 251. See also Ward *v.* Louisville, etc., R. Co., 3 Am. & Eng. R. R. Cas. 506; Omaha, etc., R. Co. *v.* Brown, 11 Ib. 501; Vosburg *v.* Lake Shore, etc., R. Co., 15 Ib. 249; Omaha, etc., R. Co. *v.* Brown, 20 Ib. 286; Bedford, etc., R. Co. *v.* Rainbolt, 21 Ib. 466.

Moore

v.

Des Moines & Fort Dodge R. Co.

(*Advance Case, Iowa. October* 11, 1886.)

In an action for damages against a railway company for injuries received while riding in one of its cars, an instruction to the jury that the company must show that it used all reasonably practical care and precaution to prevent the injury, is erroneous. A carrier is bound to exercise the highest degree of care and skill to preserve the safety of its passengers.

In an action for damages against a railway company, the plaintiff alleged several specified injuries. The court instructed the jury to the effect that, if they found that one specified injury was not caused or aggravated by the accident, then they should find for the defendant. *Held*, an erroneous instruction, although in other instructions the jury were told that if they found for the plaintiff they should award damages sufficient to compensate him for all the injuries received.

Appeal from Dallas Circuit Court.

Plaintiff brought this action to recover damages for certain personal injuries which he alleges he sustained while traveling as a passenger on defendant's railway. The verdict and judgment were for defendant, and plaintiff appealed.

Cardell & Shortley, for appellant.

Nourse, Kauffman & Gurnsey, for appellee.

Reed, J.—While plaintiff was travelling as a passenger on one of defendant's railway trains, the car in which he was riding was

thrown from the track by a misplaced switch, and turned over on its side. He alleges that in the accident he was thrown against the side of the car, and against one of the seats therein, and that he was bruised and injured in his side, also in his arm and head, and that he sustained a rupture of the character known as a "scrotal hernia." He also alleges that the accident to the car was caused by the negligence of defendant's employees, who were in charge of the train. On the trial it was admitted that the overturning of the car was caused by a misplaced switch, and no evidence was introduced by defendant tending in any manner to account for the misplacement of said switch. Plaintiff testified that, by the turning over of the car, he was thrown on his side against the car and one of the seats in it, and that when he got out of the wreck he discovered that one of his arms was bleeding; also that one of his fingers had been injured, and that some time after, in making an examination of his person, he discovered that his side was bruised, and that he was ruptured—the latter injury being of the character denominated "scrotal hernia"—and that he suffered a great deal of pain from the injury in his side and from the rupture; also that the hernia was not reduced until four days after the accident, when he went for the first time to a physician, who reduced it. Defendant introduced evidence tending to prove that plaintiff was ruptured before the accident. It also introduced two physicians who had practised their profession for many years, and had had much experience in the treatment of hernia, who testified that they had made an examination of plaintiff some time after the accident, and they had heard his testimony as to the manner in which he had received the injury, and as to his symptoms immediately after it occurred, and each, in effect, gave it as his opinion that the scrotal hernia of which plaintiff complained was not caused by the accident.

FACTS.

1. The Circuit Court gave the following instruction, the giving of which is assigned as error: "If you find from the evidence that the plaintiff received an injury while riding on the cars of the defendant by reason of the tipping over of a car in which he was riding, and while he himself was using all reasonable care and caution to avoid injury as charged in the petition, then these facts will make a *prima facie* case of negligence against the defendant, and the burden of proof will be on the defendant to show that it, by its agents and servants, did use all reasonably practicable care and precaution to prevent such injury, and that the accident resulted from a cause which could not have been foreseen or prevented by the exercise of reasonable care, vigilance and foresight on behalf of the company." The objection urged against the instruction is that it does not lay down the true rule as to the degree of diligence and care which the carrier is bound to exercise for the

PRIMA FACIE CASE—BURDEN OF PROOF—DEGREE OF CARE.

safety of the passenger. The doctrine of the instruction is that the defendant would not be liable for the injury if the accident resulted from a cause which reasonable or ordinary care and diligence could not have foreseen and provided against. And in this respect it is erroneous. The rule has always been held, in this State, that the carrier was bound to exercise the highest degree of care and skill to preserve the safety of the passenger, and prevent accidents. See Frink *v.* Coe, 4 G. Greene, 556; Sales *v.* Western Stage Co., 4 Iowa, 545; Bonce *v.* Dubuque St. Ry. Co., 53 Iowa, 278; s. c. 5 N. W. Rep. 177; Kellow *v.* Central Iowa Ry. Co., 23 N. W. Rep. 740. We are of the opinion, however, that plaintiff was not prejudiced by the instruction. By it the jury were told that proof of the accident made a *prima facie* case against the defendant on the question of negligence. As it made no attempt to account for the accident, this was equivalent to a direction to find for plaintiff if the other elements of his case were established. The presumption is that the jury found against him on the other question involved in the case.

2. The court gave the following instruction: "If you find from the evidence that the plaintiff, at the time or prior to the accident complained of, was or had been suffering from the effects of inguinal hernia, and by reason of the overturning of the car received additional injuries of the affected parts, he would be entitled to recover for such additional injury. But if you fail to find that the scrotal hernia was caused by the overturning of the car, as alleged, then and in that event the plaintiff cannot recover." This instruction is erroneous. Under the evidence, the jury might have found that plaintiff suffered the injuries to his side and arm and hand alleged, and have failed to find that the scrotal hernia was caused by the overturning of the car. By the last clause of the instruction they are told, in effect, that, if that is the state of proof, plaintiff cannot recover. Yet he clearly was entitled to recover if he had established that he sustained any of the injuries in the accident of which he complained. It is true that in other instructions the jury were told that, if they found for plaintiff, they should award him such damages as would compensate him for all the injuries suffered by him in consequence of the overturning of the car. But these instructions, in so far as they warranted the jury in awarding plaintiff damages for the minor injuries of which he complained if they found against him as to the chief injury complained of, the scrotal hernia, are in conflict with the one set out above, and it is impossible to determine which instruction the jury obeyed. We cannot say that for the minor injuries plaintiff was entitled to recover no more than nominal damages. On the contrary, the jury would have been justified, under the evidence, in

INJURIES RECEIVED—ONE NOT CAUSED BY ACCIDENT.

awarding him substantial damages on account of the alleged injury to his side.

Other questions argued by counsel relate simply to the order of the trial, and will not be likely to arise on a retrial of the cause.

For the error pointed out the judgment will be reversed, and the cause remanded.

Degree of Care Imposed Upon Railroad Company as to Track and Machinery.—See generally Kentucky, etc. R. Co. *v.* Thomas, 1 Am. and Eng. R. R. Cas. 79 ; Penna. R. Co. *v.* Roy, 1 Ib. 225 ; International, etc., R. Co. *v.* Hallorem, 3 Ib. 343 ; New York, etc. R. Co. Dougherty, 6 Ib. 139 ; Robinson *v.* N. Y., etc.,R. Co., 6 Ib. 592 ; Louisville, etc., R. Co. *v.* Weams, 8 Ib. 399 ; Burlington, etc., R. Co. *v.* Raymond, 13 Ib. 6 ; Little Rock, etc. R Co. *v.* Miles, 13 Ib. 10 ; Smith *v.* St. Paul, etc., R. Co., 16 Ib. 310 ; Raymond *v.* Burlington, etc. R. Co., 18 Ib. 217.

INTERNATIONAL AND GREAT NORTHERN AND MISSOURI PACIFIC R. CO.

v.

GRAY AND WIFE.

(*Advance Case, Texas.* 1885.)

The plaintiffs were on a hand-car on the defendant road with the permission of the company. The car was in the regular performance of its duty, and was rightfully on the track. A regular train on the road was behind time. It had just passed a road-crossing without sounding the whistle as it was required to do by law, and was nearing a bridge and trestle-work, where, by the rules of the company, it was required to moderate its speed to four miles an hour, yet on this occasion it was running at the rate of twenty miles an hour. After crossing the road it ran into a cut where the track made a sharp curve, and collided with the hand-car, which was but a short distance from the crossing, and produced the injuries of which the plaintiffs complain. It was conceded that there was negligence in the operation of the train by the defendants, but it was contended that the plaintiffs could not recover, for the reason that they were guilty of contributory negligence in not sending out flagmen as was required by the regulations of the company where the presence of the car in a curve placed it in a dangerous position. *Held*, that as the hand-car would have been in no danger from the over-due train had the signals been given at the road crossing and the speed of the train slackened as required by the regulations, those upon the hand-car had a right to rely upon the performance of their duty by the employees on the train and were not guilty of negligence contributing proximately to the injuries received.

APPEAL from Cherokee county.

WILLIE, C. J.—This case comes before us upon one assignment

of error only of which we can take notice, viz: "The verdict of the jury is manifestly contrary to the law and evidence, for the uncontradicted evidence shows that the plaintiffs, by their own negligence, contributed proximately to the injury complained of." QUESTION.

It seems to be conceded that there was negligence in operating the train that collided with the hand-car, and the case is rested by the appellants upon the contributory negligence of the parties injured by the collision. The question as to negligence in the operation of the train by the companies' employees, and that as to the contributory negligence of the plaintiffs, may be considered together, as they must both depend for solution upon the relative duties due from the parties to each other.

The plaintiffs were lawfully upon the hand-car at the time of the collision. Whether they were entitled to be considered passengers, with all the rights which that position implies, is not necessary for us to consider. They were on the car with permission of the company, as is fully shown by the evidence. The car itself was in the regular performance of its duty, and was required to make this very trip by the owners of the company. It was therefore rightfully on the track at the place and time of the collision, and the plaintiffs were lawfully on board of it. The fact that the train was behind time, did not require that the hand-car should keep off the track, but it was obliged to be there in the performance of its duty to the company. No matter whether an expected train of the company was behind time or not. FACTS.

The train was behind time, as had generally been its habit. It had passed a road-crossing, before reaching which it was required by law to sound a whistle, which requirement had been complied with by all trains upon all former occasions. It was nearing a bridge and trestle-work, and the rules of the company required it to moderate its speed to four miles an hour, and it had passed a signboard giving its directions to that effect. It had never gone at a speed of more than six or eight miles an hour at the place where the accident happened; yet on the occasion it was running at the rate of twenty miles an hour. Without giving any signal or checking its speed, it crossed the road, ran into a deep cut where the track made a sharp curve, and there collided with the car which was but a short distance from the crossing, and produced the injuries of which the plaintiffs complain.

The acts of negligence on the part of the train men, the failure to give the statutory signals at the crossing, and excessive rate of speed at the time and place of the accident. The only act of negligence, if any, that can be alleged against the persons in charge of the hand-car, was the omission to send out flagmen while in the cut, so as to warn the train of its presence.

The evidence does not show that it was the imperative duty of

the persons in charge of the hand-car, such as the one upon which the plaintiffs were riding, to send out flagmen before and behind in situations like the one in which this car was placed when the collision occurred. The regulations of the company require that hand-cars and track cars should be protected by flagmen when by reason of fogs, sharp curves and the like, risk was involved; and added that this was particularly necessary in case of loaded track cars. It was, however, proved that in practice flagmen were sent out only in cases when a loaded track or hand-car was being propelled upon the railroad. The reason given for this was that track cars or loaded hand-cars could not be easily taken off the track, and this made it necessary to send out flagmen. It was therefore questionable whether the regulations applied to an unloaded car, and as the court could not say as matter of law that it did, the jury were to judge of the meaning and effect of the regulation, taken in connection with the manner in which it was enforced as shown by the testimony of witnesses competent to speak upon the subject. The regulation, too, upon its face did not seem to require that in short curves flagmen should be sent out before and behind at all times, but only when the presence of the cars in the curves placed it in a dangerous position. The hand-car would have been in no danger from the front, if the train, instead of being behind time, had already passed, and it would not have been negligence not to have sent out a flagman to the front. It would have been in no danger, from the evidence, from the overdue train had the signals been given at the road-crossing and the speed of the train slackened as required by the company's regulations. Hence, without a neglect of duty by the trainmen the position of the car in the cut was not one involving risk. Upon the performance of their duty by the employees on the train the car hands relied; and the question is, were the facts sufficient to authorize the jury to find that the plaintiffs were not, under the circumstances, guilty of such negligence as contributed proximately to the injury of which they complained.

DUTY OF PERSONS ON HAND-CAR TO SEND OUT FLAGMAN TO WARN TRAIN.

While the statutory signals to be given at road crossings are intended as warnings to passers upon the road or near the crossing, the failure to give them may be taken into consideration together with other facts to show want of reasonable care on the part of the company as to other parties lawfully upon the railway. W. & A. R. Co. *v.* Jones, 8 Am. & Eng. R. R. Cas. 267.

OMISSION TO GIVE SIGNALS AT CROSSING.

In the one case the omission of the signals is negligence *per se*, and may be so decided by the court; in the other it may or may not be negligence under the circumstances, and the jury must pass upon the question.

In the case above cited the law required that the whistle should be blown and the speed of the train checked upon approaching a

public crossing. It was *held* that while these provisions were intended to protect life and property at such crossings, yet when an accident occurred just beyond a crossing, the fact that these requirements were disregarded might be considered by the jury in determining the question of negligence on the part of the railroad company.

And so as to excessive rate of speed. While a railroad company has the right to run its trains at any rate of speed it may choose, when not prohibited to do so, yet circumstances may impose such restrictions upon the right as to authorize a finding that excessive speed at a time or place will be negligence on the part of the company. Thomas *v.* Railroad Co., 8 Fed. Rep., 720. Here not only circumstances but positive regulations required the train to go slow at and near the point of collision. While statutory law imposes certain duties upon these companies for the protection of life and property at points of the greatest danger, they owe duties to the general public which require that they exercise proper care to avoid injury to any of its individual members. The omission to perform these duties may be the highest degree of negligence; and the facts as to their omission, and as to whether this constitutes negligence under the particular circumstances, should be left to the jury.

EXCESSIVE RATE OF SPEED.

Where the company have invariably obeyed the law in reference to the signals to be given at a particular crossing, and have, at the same time, rules which require its trains to run slowly at that point of its track, which rules have been usually complied with, the public may have a right to conclude that the law and rules will be observed on any given occasion, and to act accordingly in their lawful use of the railway track. Not only so, but the employees operating.....placed upon their obeying the statute laws and the rules of the company, the latter should be held liable for any failure to do so, from which damages have resulted to property or person.

It has been held that where a train had been uniformly run and operated in a certain manner, it is evidence of negligence not to run it in the same way at any particular time, and that one who had the right to act upon the belief that it would be so run and operated, and who was injured because it was not, could recover. Schultz *v.* C. & N. W. R., 44 Wis. 688.

The usual manner of operating the train, neglected on that occasion, was to ring the bell before starting, and to run the train at a reasonable rate of speed.

It is not contributory negligence not to anticipate that another will violate the law in a given particular, and in not providing against such possible violations of it. 2 Thompson on Negligence, 1472, sec. 18.

Though the rules of the company may have required that the hand-car be kept out of the way of trains, and send out flagmen when by reason of short curves, risk was involved, it certainly is not contemplated that they should anticipate danger when it could not possibly arise except by reason of a violation of rules on the part of the train men, and through them of the company itself.

OMISSION TO SEND OUT FLAGMAN NOT CONTRIBUTORY NEGLIGENCE.

The hand-car was upon the track at a time when in the proper discharge of its duties it was likely to be there. With a knowledge of this fact the employees of the train were chargeable. They had no right to trust to the supposition that, if, in the cut, the hand-car men, though lulled into security by the omission of signals required of the train, would regard the situation as dangerous, and send out flagmen for their protection. They at least had no right to run the train at such an unusual rate of speed in violation of the rules of the company, when they must have known that on this account, if the hand-car was in the cut, a collision might and possibly would ensue, though the hand-car men should faithfully obey the rules prescribed for their government.

We think the jury were properly allowed by the court to pass upon all the facts as to the conduct of the employees in charge of the train and those on the hand-car, and the situation and circumstances attending the collision, and the facts by which it was brought about, and finding as they did that the injury was not caused proximately by the negligence of the plaintiffs, we are not prepared to say that their verdict is against the evidence.

The charge of the court copied in appellant's brief did not instruct them that the facts stated in the charge would constitute negligence on the part of plaintiffs, but left the question as to whether they would or not to be determined by the jury. This was proper, and we see no error either as against law or evidence that the jury or court have committed, and the judgment is affirmed.

Right to Rely upon Giving Signals.—See note to Silver City, etc., R. Co. v. Murray, 26 Am. & Eng. R. R. Cas., 162.

PHILPOT *et al.*

v.

MISSOURI PACIFIC R. Co.

(85 *Missouri*, 164.)

The right of action given by Revised Statutes, section 2121, for the death of a person occurring in this State by reason of the negligent act of a railroad, is not limited to residents of this State.

Wherein such action brought here by a husband and wife, residents of the State of Texas, for the death of their minor son, who was also a resident of Texas, the laws of this State, and not of Texas, will determine the question of the minority of the son. Besides, in the absence of any evidence to the contrary, it will be presumed that the age of majority is the same in Texas as it is here.

Section 2121 of Revised Statutes is both penal and compensatory, and the emancipation of a minor son by his parents is no defence to an action thereon by them for his death.

APPEAL from St. Louis Court of Appeals. Affirmed.
H. S. Priest and *T. J. Portis* for appellant.
Collins & Jameson for respondents.

BLACK, J.—The plaintiffs, husband and wife, recovered judgment against the defendant for the sum of $5000, because of the death of their minor son, between nineteen and twenty years of age, occasioned by the collision of two trains of cars on the defendant's road, at Washington, in this State. The son was, on the night of the 30th of May, 1881, travelling in the caboose car of a stock train, in charge of stock, when this car collided with the caboose car of another train. From the effect of the injuries thus received he died in some ten or twelve days. The collision was occasioned by the negligence of defendant's servants, as found by the jury. The defendant, among other things, answered that the plaintiffs and their son were residents and citizens of the State of Texas; and, further, that they had emancipated their son from all paternal control and interference. These defences were, on motion of plaintiffs, stricken out. Of this ruling error is assigned. FACTS.

1. The cause of action accrued in this State. The plaintiffs assert their rights under the provisions of our Damage act. There is nothing in the act which in the least indicates a legislative intent to limit the rights thereby conferred to residents, or to persons domiciled in this State. Its provisions are for the benefit of the travelling public—alike for the resident and non-resident. ACTION BY NON-RESIDENT.

2. There was no evidence as to what the age of majority is in the laws of the State of Texas. Proof of this, it is contended, was an essential element of the plaintiff's case. We must be guided by our own law in this respect. As to acts done and rights acquired here, the laws of this State, and not those of Texas, must determine whether the son was or was not a minor. 4 Kent's Com. (12 Ed.) 233, n. c.; Gilberth *v.* Bunce, 55 Mo. 349. Besides, in the absence of any evidence as to what the age of majority is in that State, we must presume it to be the same as fixed by the common law of this State, which, doubtless, would be twenty-one years.

MINORITY—LAWS OF ANOTHER STATE.

3. A father may emancipate his son, and when he has done so, the son will be entitled to his own earnings until the father sees fit to resume his authority. Ream *v.* Watkins, 27 Mo. 519. This being the law, it is insisted that the statute is compensatory, and because of the emancipation the parents are not damaged. This suit is based upon section 2121, Revised Statutes, 1879, which provides, so far as applicable to this case, that whenever any person shall die from any injury occasioned by the negligence of any servant or employee while managing any car or train of cars, the corporation in whose employ such servant or employee shall be at the time such injury is committed shall "forfeit and pay for every person so dying the sum of five thousand dollars," which may be sued for and recovered, when the deceased is a minor and unmarried, by the father and mother, and each shall have an equal interest in the judgment. The statute is remedial, and is designed to be compensatory in part. But it is more than this. The case at bar demonstrates the fact that it cannot be wholly compensatory, for the amount of the recovery, being fixed as it is, is altogether out of proportion to the value of the services of the son for the remainder of the period of his minority. The law is also designed to guard and protect persons and the travelling public against the wrongful acts thereby prohibited. Whether the amount awarded is denominated damages, compensatory damages, liquidated, as was said in Coover *v.* Moore *et al.*, 31 Mo. 574, or a penalty, is not material. The law, as well as being compensatory, is of a penal and police nature, and can, without objections, subserve both purposes at one and the same time. The right to recover is, therefore, not made to depend upon services which the deceased could have rendered to the persons suing. The emancipation of the son by the parent, if alleged and proved, constitutes no defence.

EMANCIPATION OF SON NO DEFENSE.

4. Other questions were raised on the trial and are preserved in the bill of exceptions, but as they are not pressed here, will not be considered.

Judgment affirmed. The other judges concur.

Right to Recover Damages for Death of Emancipated Minor Child.—The rule is that if there be a reasonable expectation of pecuniary advantage from a person bearing the family relation, the destruction of such expectation by negligence occasioning the death of the party from whom it arose, will sustain the action. Penna. R. Co. *v.* Kellar, 67 Pa. St. 300; Penna. R. Co. *v.* Adams, 55 Pa. St. 499; Franklin *v.* Southeastern R. Co., 4 H. & N. 211. Where the death of a person is caused by negligence, the only damages recoverable are for the injury to the relative rights of the surviving members of the family, and are compensatory in their nature. Where, therefore, a child is free by age or emancipation, and lives apart from his parents, and in no way contributes to their support, his parent cannot recover damages for his death. Lehigh Iron Co. *v.* Rupp, 100 Pa. St. 95. The father having relinquished his parental control over a minor child, he cannot maintain an action against a justice of the peace or a clergyman to recover the penalty given by Act of 1729, for marrying such minor without the parent's consent, and without the publication of banns. Robinson *v.* English, 84 Pa. St. 324. A father who turns his daughter out of his house upon the world to shift for herself, thereby relinquishing his parental rights in relation to her person, absolves her from filial allegiance, and deprives himself of a right of action under the statute against marrying minors without the consent of their parents. Stansbury *v.* Bertron, 7 W. & S. (Penna.) 362.

Central Texas & North Western R. Co.

v.

Hancock.

(*Advance Case, Texas.* 1885.)

Where the statute provides that when depositions are sent by mail "the postmaster or his deputy mailing the same shall indorse thereon that he received them from the hands of the officer before whom they were taken," an indorsement on a deposition as follows: "Received this package from the hands of W. W. Gray, clerk, the officer before whom the deposition was taken. (Signed) G. S. Smith, P. M.," is sufficient.

Where the verdict is abnormal, and circumstances occurred at the trial which may have unduly influenced the action of the jury, the court will not hesitate to set it aside. Remarks of counsel in this case held cause for reversal.

Frost, Berry & Lee for appellant.
Kemble & McKnight for appellant.

Appeal from Ellis county.

On the 19th day of July, 1883, appellee purchased a ticket at Waxahachie from appellant's agent, which entitled him to a passage on appellant's cars from Waxahachie to Garrett. He got aboard and took his seat in the regular passenger coach. The train was made up of about fourteen freight cars and one passenger

coach, the coach being in the rear. When about half way between Waxahachie and Garrett, the hind wheels of the tender and the two freight cars next adjoining the tender left the track, causing a sudden stopping of the train, whereby appellee was thrown from his seat and injured. The train at the time was running about eight miles an hour. The coach in which appellee was riding was not derailed, and no one else therein suffered any injury.

On December 12, 1883, appellee brought this suit in the District Court of Ellis county, alleging that the injuries he had received were permanent and serious. That in consequence of said shock his genital and urinary organs had been paralyzed and himself crippled for life.

Defendant answered by a plea of not guilty. The case was tried at the September term, 1884, and resulted in a verdict for plaintiff—appellee—for $10,000 actual and $5000 exemplary damages, but appellee afterwards remitted the exemplary damages. A new trial was refused, and the defendant has appealed and here asks a reversal: 1. Because of the rulings of the court in the admission of testimony. 2. Because of alleged unfairness and misconduct of counsel in their arguments before the jruy. 3. Because of alleged errors in the charge of the court.

The depositions of D. C. Sealy, Dr. May, Dr. White and others had been taken by appellee, and appellant moved to suppress them, because the person receipting therefor did not show that he was postmaster at the place where the depositions were mailed. This motion was overruled, and this ruling is assigned as error.

Several physicians, whose testimony was taken by deposition, testified as to their diagnosis of appellee's case, the diagnosis being based on statements which they said had been made to them by appellee. This testimony was admitted over appellant's objection, and the ruling is assigned for error.

Amzi Bradshaw, in his argument to the jury, used the following language: "In the trial of this case you have the contest of wealth against that of poverty. There is Vestal—one of the defendant's witnesses—who is the employed agent of the railroad company. He kept a watch on Hancock and has suborned witnesses with railroad money." A. A. Kemble, Esq., in his argument to the jury, said: "The railroad has skilled attorneys; you saw them make a motion asking the court to appoint a committee of physicians and surgeons to examine Hancock. They were not entitled to it; they had no right to have such committee appointed; it was a cute trick on the part of defendant's lawyers; if we had resisted the motion, then they would have used it against us in their argument to you that we were afraid to let Hancock be examined. We asked them to submit the motion without reading it. They refused. Why was this, gentlemen? It was that the jury might hear it. But we were not to be caught in that trap." And M. W. McKnight, in

the closing argument, said: "Gentlemen, this rich corporation has employed able counsel, who come here and denounce Hancock as a fraud and a liar, endeavoring by a course of two years' conduct to manufacture testimony wherewith to rob this rich corporation. More than that, they cast aspersions on the good name and character of his wife, by this man Poteet—one of the defendant's witnesses—who swears that while he was gathering up the tail end of his family at church a certain conversation between himself and plaintiff occurred which I will not repeat. I tell you, gentlemen, such testimony and such a defence as that aggravates this case. Not content with having injured, crippled and ruined him for life, they come into court and ridicule his injuries, denouncing him as a fraud and liar, and cast aspersions upon his family. You should compensate him for this, gentlemen. You should teach this rich corporation that they shall not make such attacks upon the fathers of this country."

DELANEY, J.—The first assignment of error is taken to the action of the court in refusing to suppress the deposition of the witness Hearne. Appellant claimed that it was not endorsed and returned as required by law. The endorsement was as follows: "Received this package from the hands of W. W. Gray, clerk, the officer before whom the deposition was taken.

(Signed) "G. S. SMITH, P. M."

ENDORSEMENT OF DEPOSITION.

From the certificate of the officer who took the deposition it appears that he was "clerk of Cameron county, Tennessee." The postmark on the envelope was as follows: "Woodbury, Tennessee, July 21." The objections to the depositions were, first, that the signature did not show that the person signing was a postmaster; second, if the initials are sufficient for that purpose, then it does not appear at what point he was postmaster.

A majority of the commission believe that the certificate is sufficient. The statute provides that if the depositions are sent by mail, "the postmaster or his deputy, mailing the same, shall endorse thereon that he received them from the hands of the officer before whom they were taken."

The fourth assignment complains of the refusal of the court to strike out the answers of Dr. Blaides to the fourth and fifth interrogatories propounded by plaintiff. The witness was asked to state his opinion of the plaintiff's condition and of the cause of his malady. In answer to the fourth question, the witness gives his opinion upon the state of the plaintiff's health. There can be no objection to this.

TESTIMONY OF PHYSICIAN AS TO PLAINTIFF'S CONDITION.

In answer to the fifth he makes some suggestions as to the probable cause of the trouble, and the defendant objects that these suggestions were founded upon what the plaintiff had told the witness about his having been hurt on the train. We do not think it im-

portant to determine whether the court erred in this matter or not, because there is, in the record, such an amount of testimony by a large number of physicians as to the character of the plaintiff's ailment and its cause, that if the testimony of Dr. Blaides had been suppressed, it could not possibly have changed the result.

But the fifth assignment is more serious. It complains of certain remarks of plaintiff's counsel in the course of the trial, which are thought by appellant to have unduly aroused the prejudices of the jury. In our opinion the largest liberty of discussion should be allowed in trials before juries, so long as the legitimate objects of discussion are kept in view. In the trial of causes, involving as they generally do the most important interests, the duties of jurors require moderation, calmness and a high sense of rectitude. In such trials everything which appeals to prejudice, or kindles animosity between different classes of men must be regarded as inimical to the due administration of justice. Our courts of last resort are accustomed to pay great deference to verdicts when there is reason to believe that they are the result of the calm and deliberate conviction on the part of the juries. And this is so even when the court may think the verdict larger or smaller than it ought to be. But when the verdict is abnormal, and circumstances occurred at the trial which may have unduly influenced the action of the jury, the court will not hesitate to set it aside.

REMARKS OF COUNSEL HELD CAUSE FOR REVERSAL.

In the case of Texas & Pacific R. Co. *v.* Dye, decided at the last Austin term, a verdict which seemed too large was set aside solely on the ground that improper remarks of counsel upon the trial may have unduly influenced the jury.

On this ground we think the verdict should be set aside in this case, notwithstanding the *remittitur* entered after the trial.

The judgment should be reversed, and the cause remanded.

Report of the Commissioners of Appeals adopted, and judgment reversed and the cause remanded. WILLIE, C. J.

What may be Commented on by Counsel in Remarks to Jury.—See Pittsburgh, etc., R. Co. *v.* Martin, 8 Am. & Eng. R. R. Cas. 253; E. Tenn., etc., R. Co. *v.* Ginley, 17 Ib. 568; Loucks *v.* Chicago, etc., R. Co., 19 Ib. 305; Texas, etc., R. Co. *v.* Garcia, 21 Ib. 384.

Louisville, New Albany and Chicago R. Co.

v.

Thompson, Adm'r, etc.

(*Advance Case, Indiana. November* 22, 1886.)

In an action by an administrator against a railroad company for the death of his intestate, caused by the negligence of the defendant, the widow of such decedent is a competent witness. Neither § 498 nor § 499 of the Indiana Code has any application to such a case.

In civil cases it is sufficient if the evidence on the whole agrees with and supports the hypothesis which it is adduced to prove.

Where the case was tried below upon the theory that the cause of action was the negligence of the appellant, that theory must prevail upon the appeal; and the action will not be treated as one for a breach of contract.

Appeal by the defendant from a judgment of the Washington Circuit Court in favor of the plaintiff, in an action for damages for negligently causing death of the intestate.

Petition for rehearing overruled.

The facts are stated in the opinion.

Alspaugh & Lawler for appellant.

Zaring, Voyles & Morris for appellee.

Elliott, Ch. J.—A nearnest and able petition for rehearing has been filed, and it is thought proper to again discuss some of the questions argued.

We said in our former opinion that, even if it were conceded that the widow of Andrew Eichler was not a competent witness, no material error was committed in permitting her to testify, and we still adhere to that view; but we are prepared to go further and hold that she was a competent witness, for the statute does not apply to cases of tort resulting in the death of the husband. Neither § 498, nor § 499 of the Code applies to a case like this; for the widow is not a party to the record, nor is her interest adverse to the estate, and the case is not one between heirs. The case is not founded on "a contract with or demand against an ancestor," or "to obtain title to or possession of property, real or personal;" but is an action to recover damages for a tort causing the ancestor's death.

Widow of deceased was a competent witness.

The circumstances proved by the appellee show that Andrew Eichler was on the appellant's train, and was killed by the falling of the train into the river. It is not necessary in any case, civil or criminal, that the material facts should be established by direct evidence. Greenleaf thus states the rule which prevails in civil cases: "In civil cases it is sufficient

Direct evidence not necessary—weight of evidence.

if the evidence, on the whole, agrees with and supports the hypothesis which it is adduced to prove."

It is also said by this author that it is the duty of the jury "to decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth." 1 Greenl. Ev. § 13.

This rule has been often approved by this court. I. R. Co. *v.* Collingwood, 71 Ind. 476; Railroad Co. *v.* Thomas, 84 Ind. 194; s. c., 11 Am. & Eng. R. R. Cas. 491; Railroad Co. *v.* Buck, 96 Ind. 346, 363; s. c., 18 Am. & Eng. R. R. Cas. 234; Hendrick *v.* D. M. Osborne Co., 99 Ind. 143, 147; Railroad Co. *v.* McKee, Id. 519, 525; Union Mut., etc., Co. *v.* Buchanan, 100 Ind. 63, 72; Railroad Co. *v.* Mosier, 101 Ind. 597; Riehl *v.* Evansville Foundry Asso., 104 Ind. 70.

The reasonable probability—and, indeed, the only fair inference from the facts and circumstances established—is that Eichler was on the train which went down into Blue River. He was in Chicago, and was expected home in Louisville about the time of his death; his route was over the appellant's road; his body was found about 1½ or 2 miles downstream; his name was on the top of his shirt; and in his pocket, among other things, was a conductor's check issued by the conductor of the train; bodies were seen washing down the river immediately after the train went down; the river was very high, and the current swift; seven persons besides Eichler lost their lives by the disaster. When Eichler's body was taken from the water it was found to be badly mangled; the "head was," as one of the witnesses said, "caved in, and his bowels torn out." Another witness says: "The body was badly torn up; right leg broken; his hip was broken, and his belly torn open." Timbers floated downstream from the bridge, displaced by the cars crashing through them. These circumstances unmistakably show that Eichler was violently killed and horribly mangled by some means, and the most natural inference in the world is that he was killed by the train's plunging through an unsafe bridge, as were seven others who were on the train; and this supplies ground for inferring that he was on the train; but in addition to this are the other facts that he was in Chicago and expected home, and had a conductor's check in his pocket. There is not one particle of evidence tending to show that he was or could have been injured in any other way than by the train in which he was seated falling through the defective bridge; but it is the most natural and reasonable of inferences to conclude that he was mangled and killed by the fall of the train, which running, as it was, at a high rate of speed upon the bridge, crushed it beneath its force and weight.

That the body was found some distance from the bridge does not invalidate this inference; for it is in the highest degree prob-

able that a body mangled as was Eichler's would have been carried down by a river swollen by a great freshet.

It is, indeed, almost inconceivable that Eichler was killed in any other manner than by the train's plunging through the bridge and crushing him between the timbers or iron of the cars and the heavy beams and sills of the bridge, so that the evidence not only supports the hypothesis of the appellee, but goes very far towards excluding any other hypothesis if, indeed, it does not go to the full extent of excluding every other.

We conclude, without doubt or hesitation, that the evidence shows that Eichler was on the train; and the authorities cited in our former opinion abundantly prove that one who is on a train used for carrying passengers is, in the absence of countervailing evidence, presumed to be rightfully there is a passenger.

The counsel assume as true that the complaint is for a breach of contract, and there are some statements in it which possibly give some support to this assumption; but the complaint, judged, as all our cases agree it must be, by its general scope and tenor, is very plainly in tort, and the cause of action is the negligence of the appellant. Henry *v.* Stevens, *post*, p. 577.

COMPLAINT NOT FOR BREACH OF CONTRACT—ACTION FOR TORT.

We do not think that the complaint assumes to state, as a cause of action, that the death of appellee's intestate resulted from a breach of contract, and it is very evident that the appellant's counsel tried the case upon a very different theory than that the action was based on a breach of contract.

As the case was tried upon the theory that the cause of action alleged was the negligence of the appellant, that theory prevails here. Carver *v.* Carver, 97 Ind. 497.

But we think it very clear that the complaint charges, as the cause of action, the tortious negligence of the appellant, and it was not necessary to do more than prove the appellant's duty, its negligent breach, and that deceased was free from contributory negligence: for it is an elementary rule that it is sufficient if the substance of the issue be proved.

It is quite probable—so much so that the jury were authorized to infer it—that the deceased purchased a ticket at Chicago, for there is no evidence to the contrary, and the conductor testified that he did take up "tickets, passes, and coupons."

We say that it was fairly inferable that the deceased had a ticket, because, as the authorities cited in our former opinion establish, one on a passenger train is presumed to be rightfully there as a passenger, and because the presumption is always in favor of honesty and fair dealing. Any other rule would work great hardship in such a case as this, where the lips of the passenger are closed in death, and where the ticket, if bought at all, was bought at a

station in a great city, where many passengers purchase tickets and embark upon the trains of the railway company.

We do not deem it necessary or proper to again discuss the question of presumptions in favor of Eichler's honesty, further than to say that it was presumably in the power of the appellant to show who Whaling was, why the pass was issued to him, and what had become of him. As we said in our former opinion, the pass issued by the appellant showed to whom it was issued, and on whose account; and no explanation at all was offered, nor was the part of the pass which the conductor testified that he took up given in evidence. We think these facts called upon the appellant to explain, and will not allow it to succeed solely on an inference which it is claimed exists, that Eichler fraudulently procured and used the pass issued to Whaling.

Mr. Broom says: "Where a party has the means in his power of rebutting and explaining the evidence adduced against him, if it does not tend to the truth, the omission to do so furnishes a strong inference against him." Broom, Legal Max. 938.

Petition overruled.

NORFOLK AND WESTERN R. CO.

v.

PRINDLE AND WIFE.

(*Advance Case, Virginia. June*, 1886.)

The second section of the Virginia act of April 4, 1877, providing that "All real and personal estate hereafter acquired by any married woman, whether by gift, grant, purchase, inheritance, devise or bequest, shall be and continue her sole and separate estate," etc., does not include the damages recovered in an action for a tort on the wife's person; and hence in a joint action by a husband and wife against a common carrier for injuries inflicted upon the wife by the negligence of the defendant company, the husband has a legal interest in the suit and the wife's common-law disability as a witness attaches, and she is not a competent witness in the case.

W. H. Bolling for appellant.
James H. Walker for appellee.

LACY, J.—In February, 1885, the defendants in error brought their action of trespass on the case against the plaintiff in error, for injury received by the defendant in error, Judy Prindle, while travelling on the road of the plaintiff in error.

The action is by husband and wife, against a common carrier for injuries inflicted on the wife by the negligence of the defendant company.

Upon the trial there was a verdict for the plaintiff for one thousand dollars, and judgment accordingly.

Upon writ of error to this court it is assigned as error, first that the action being as stated above, and the recovery belonging to the husband, the wife was admitted as a witness in the case, and permitted to testify notwithstanding the interest of her husband. COMPETENCY OF WIFE AS WITNESS.

On the other hand it is insisted that the husband has no interest in the suit but is joined for conformity only; that the interest of the wife does not disqualify her under one act notwithstanding such interest, Code 1873, ch. 172, sections 21, 22. That while under that statute the common-law rule as to the incompetency of husband and wife to testify for or against each other is expressly preserved, that the husband could not testify because of the interest of the wife; that while she is competent to testify notwithstanding her own interest, she would not be competent to testify if her husband had any interest in the suit; but that her husband having no interest, she is not excluded as a witness.

In the case of Hayes and Wife *v.* Mutual Protection Association, 76 Va. 228, this question was considered and discussed by this court in a case arising at the suit of the wife under the act known as the Married Woman's Act, approved April 4, 1877, acts 1876–7, p. 333–4, in which the court held the wife competent to testify, because it was her suit to recover her separate property, and that her husband had no interest and was a nominal party only, joined in obedience to the statute, but having no interest and not liable for costs. In a late case of Farley *v.* Tiller, not yet reported, this court held that in a suit against a wife who was engaged on her own account in keeping a hotel, her husband was joined in obedience to the statute cited above, known as the Married Woman's Act; that he was a nominal party only, had no interest in the subject matter of the suit, and that while the husband could not testify because of the interest of the wife, she was not disqualified because of her interest in the suit, by reason of the 21st and 22d sections of ch. 172 of the Code of 1873, and not because of her husband's supposed interest, because under our statute it was her separate estate, and her husband had no interest. SAME—VIRGINIA DECISIONS EXAMINED.

In the first-named case, the subject of controversy was on a policy of insurance, and the amount payable to the beneficiary, who was a married woman, was held to be the property of such married woman for her sole and separate use, that it was not liable to the debts of her husband; that he had no interest in it whatever under the act approved April 4, 1877, acts 1876–7, p. 333–4.

In the second-named case cited above the action was against the wife for alleged liabilities as a sole trader, and the husband was held to have no direct interest in the suit, and to be a nominal

party only, and in both, as has been said, the wife was allowed to testify. See also Frank & Adler *v.* Lilienfeldt, 33 Grat. 377.

These cases seem to have been covered by the terms of our statute. We must now consider whether under the said Married Woman's Act, the recovery in this case is the sole and separate property of the wife. The property right involved is the chose in action of the wife; so far as a claim for damages is for injuries to the person of the wife; it must be recovered in the joint suit of the husband and wife; it is her suit; but if it is brought during the lifetime of the husband he must be made a plaintiff with her; it is a suit for the recovery of her damages; when the judgment is recovered it becomes her chose in action; when the money is paid it is his, unless by the statute above referred to and known as the Married Woman's law, it is made her separate estate. If it is by the said act made her separate estate, then the husband has no legal interest whatever in it, and she is not debarred from testifying in a suit concerning it by reason of any interest of his; and he is a party to the suit only nominally, being joined for conformity, the statute so requiring. While on the other hand, if the statute does not so affect it as to make it the separate estate of the wife, the right of the husband attaching, the wife would be debarred, under the common-law rule of evidence, not altered by our law, from testifying because of the interest of her husband.

SAME—EFFECT OF STATUTE.

The second section of the act of April 4, 1877, *supra*, is as follows:

"All real and personal estate hereafter acquired by any married woman, whether by gift, grant, purchase, inheritance, devise or bequest, shall be and continue her sole and separate estate," etc.

The words "all real and personal estate" are the most general, and clearly include the chose in action in question, but it must not only be of a nature to be included within the terms descriptive of the sort of property embraced by the statute, but when the statute has designated the modes by which it must be acquired, by so doing it has excluded all other modes of acquisition, and the statute applies to none other than such as has been acquired in the prescribed mode. Under the common law the right of the husband to the wife's choses in action was qualified; it was the husband's upon condition that he should do some act while the coverture lasts to appropriate them to himself. If he die before he so reduces it, it survives to the wife. If the wife die before he so reduces it, it is not his; he has no title to it; it goes, strictly speaking, to her personal representative. That reduction into possession which makes the chose absolutely as well as potentially the husband's, is a reduction into possession not of the thing itself but of the title to it.

WIFE'S SEPARATE ESTATE—APPLICATION OF STATUTE TO CHOSE IN ACTION IN QUESTION.

If the chose in action is made the separate property of the mar-

ried woman by statute, then the common-law right of the husband in the chose being intercepted and destroyed, it is absolutely hers, and he has no interest in it whatever.

Do the words in the statute, cited above, cover such property or point to such damages as may be acquired by a married woman in an action for a tort, or any wrong done to her?

This second section came under judicial consideration in this court in the case of Williams *et al. v.* Lord & Robinson, 75 Va. Rep. 398, when Judge Burks, speaking of the said section, said: "The second section secures to her such separate estate in all property acquired by her, after and during marriage in either of the modes designated in that section. Estate and purchase are the most comprehensive words in legal terminology; property in choses in action is certainly personal estate, and the acquisition of such choses for a valuable consideration is a purchase even in the most restricted legal sense of that term. This interpretation is so obvious and free from difficulty, that it needs no support and admits of no successful contradiction from the adjudication of other States under acts of similar character, whatever those adjudications may be."

Is there any mode prescribed by our statute for the acquisition of property by the married woman which will include or point to this chose in action? If so, then it is the wife's, and the husband has no legal interest. If not, then the husband has a legal interest under his common-law right.

Let us see. The terms are "gift, grant, purchase, inheritance, devise or bequest." Can it be designated by the word purchase, that is a term among the most comprehensive known to law. Mr. Bouvier says: "Purchase is a term including every mode of acquisition of estate known to the law except that by which an heir, on the death of his ancestor, becomes substituted in his place as owner by operation of law." 2 Wash. R. P. 401.

There are six ways of acquiring a title by purchase, namely, by deed; by devise; by execution; by prescription; by possession or occupancy; by escheat. In its now limited sense purchase is applied only to such acquisition of lands as are obtained by bargain and sale for money or some other valuable consideration. In common parlance, purchase signifies the buying of real estate, and of goods and chattels. Webster defines it, to acquire by seeking; to gain, obtain, or acquire; to acquire by any means except descent or inheritance.

In what sense was this word used by the legislature? What was the intention of the law-maker? It has been said by the Supreme Court of the United States that "the popular or received import of words furnishes the general rule for the interpretation of statutes. Mailard *v.* Lawrence, 16 How. 251. And it has been held that statutes are to be in-

SENSE IN WHICH "PURCHASE" IS USED IN STATUTE.

terpreted with reference to the principles of the common law in force at the time of their passage, except where the statute itself or the courts have otherwise determined. How *v.* Peckham, 6 How. Pa. Rep. 229; Rice *v.* M. & N. W. R. Co., 1 Blatch, 359. The rules by which the sages of the law, according to Plowden, have ever been guided in searching for the intention of the Legislature, are maxims of sound interpretation, which have been accumulated by the experience and ratified by the approbation of ages. The resolutions of the Barons of the Exchequer in Hayden's case, for the sure and true interpretation of all statutes in general, be they penal or beneficial, restrictive or enlarging of the common law, four things are to be discovered and considered:

1. What was the common law before the making of the act?
2. What was the mischief and defect against which the common law did not provide?
3. What remedy the parliament hath resolved and appointed to cure the disease of the Commonwealth?
4. And, fourthly, the true reason of the remedy?

It was then held to be the duty of the judges at all times to make such construction as should suppress the mischief and advance the remedy, putting down all subtle inventions and evasions for the continuance of the mischief, *et pro privato commodo*, and adding force and life to the cure, and the remedy according to the true intent of the makers of the act *pro bono publico*."

"To know what the common law was before the making of a statute, whereby it may be seen whether the statute be introductory of a new law or only affirmative of the common law, is the very lock and key to set open the windows of the statute."

"Statutes are to be construed with reference to the principles of the common law. For it is not to be presumed that the legislature intended to make any innovation upon the common law, further than the case absolutely required. The law rather infers that the act did not intend to make any alteration other than what is specified, and besides what has been plainly pronounced; for if the parliament had had that design, it is naturally said, they would have expressed it."

It is a sound rule that whenever one legislature uses a term without defining it, which is well known in the English law, and there has a definite and appropriate meaning affixed to it, they must be supposed to use it in the sense in which it is used in the English law. Hillhouse *v.* Chester, 3 Day (Conn.), 166.

The foregoing are substantially the rules upon which we must proceed in construing the statute in question. Beyond the force of the cited cases we have seen no decisions of binding authority upon us in our own court, and we have found none precisely in point from other States.

But as there are statutes in other States similar to our own, the decisions there may be of some assistance in passing upon what appears to be a nice question. In Michigan the prescribed words are "gift, grant, inheritance, devise, or in any other manner."

CONSTRUCTION PLACED UPON SIMILAR STATUTES IN OTHER STATES.

In a suit for damages for injuries to the person of the wife, in the case of Berger *v.* Jacobs, 21 Mich. 215, 221, Judge Christiancy said: "We think within the fair intentions of this section the right to recover damages for her personal injury and suffering from an assault and battery committed upon herself should be placed upon the same ground as choses in action or pecuniary claims, or rights accruing to her during her coverture; that such damages when recovered would, under this statute, constitute a part of her individual property. She could, therefore, we think, release such damages before or after action brought, or appropriate or convey them when recovered in the same manner as when unmarried, and the husband has no right in or control over the action." And the like was held in Illinois, in the case of Chicago, etc., R. Co. *v.* Dunn, 52 Ill. 260; in this State she is authorized to sue alone for a tort committed upon her person. The general words of the statute are, "descent, devise, or otherwise."

In the Massachusetts law the words were, "descent, devise, bequest, gift, or grant, that which she acquires by her trade, business, labor, or services," but it contains no general words like the Michigan statute, nor specific words pointing to property acquired by being wronged. And under it, says Mr. Bishop, the Maine construction not being permissible, the omission was supplied by a separate statute, that "any married woman may sue and be sued in actions of tort as though she was sole, and all sums recovered by her shall be her sole and separate property." Mr. Bishop says it is not enough that the thing claimed by the wife is property; it must, moreover, come to her in the way in which the statute points. Bishop on the Law of Married Women, vol. 2, sec. 78.

In New Jersey the words are, "gift, grant, devise, or bequest." The courts of that State have held that these words are not to be taken in a narrow or restricted sense. Ross *v.* Adams, Dutchu, 160; Rice *v.* Railroad, 1 Black, 358. But the rights of the wife are held to be limited by the mode prescribed.

In this State the statute in question must be regarded by all reflecting persons as wholesome and most salutary, having for its object the securing to married women their property coming to them in the prescribed mode against the casualties of life in our country, where the fortunes of all are subject to constant fluctuations, and the spirit of enterprise and its kindred spirit, speculation, involve the homes and fortunes of every family in danger of sudden loss, if not in cer-

STATUTE DOES NOT INCLUDE DAMAGES RECOVERED FOR TORT TO WIFE'S PERSON.

tain and inevitable ruin. To secure to the wife and mother in her own fortune the means of rearing her children is wise policy and a just and humane device of the law. And we are of opinion to give to the legislative enactment in this regard its fullest legitimate scope, and to extend it to every mode of acquisition which the legislature has authorized, to give the fullest force to the law which its terms will permit; and if we stop short of the extension of the terms of the law beyond their legal signification it is because we are unwilling in any wise to invade the legislative province.

The laws must be made by the legislative power. Courts must stop where the legislature has seen fit to stop.

We must determine this question as though it were a question raised here between the two claimants of this sort of property, the husband on the one hand and the wife on the other. In such a controversy we would be compelled to hold that the common-law rights of the parties remained intact except so far as they are affected by the statute. The words of the statute plainly do not include the damages recovered in this case for a tort on the wife's person. The word purchase must be held to mean in the statute what is its legal signification in the English and American law. It applies to the acquisition of real property acquired in all other ways and modes except by inheritance; it cannot be held to apply to this chose in action.

It follows that the husband has a legal interest in the suit, and the wife's common-law disability as a witness attaches, and she is not a competent witness in this case, and the Circuit Court erred in ruling otherwise, and for this error the judgment complained of must be reversed and annulled, and the cause remanded for a new trial to be had therein in the said Circuit Court.

It is not necessary, therefore, to pass on any other question raised in the record.

Where Wife is Interested and Party to Suit Husband cannot Testify.— Shenandoah R. Co. v. Lewis, 12 Am. & Eng. R. R. Cas. 305.

Ohio and Mississippi R. Co.

v.

Cosby *et al.*

(*Advance Case, Indiana. June* 4, 1886.)

An exception to the general rule, that a complaint, to withstand a demurrer, must state a cause of action in favor of all the plaintiffs, occurs when the plaintiffs are husband and wife, and the action relates to injuries to the person or character of the latter; for the husband is a proper although not a necessary party.

An instruction was erroneous which authorized the jury to include in their assessment the damages recoverable by the husband, as well as those which the wife might recover for her separate use. Her recovery was limited to the injuries to her person, including pain, anguish of mind and all such other damages resulting from the negligence of the railroad company as were not presumptively injuries to the husband.

To justify the assessment of damages for future or permanent disability it must appear that continued or permanent disability is reasonably certain to result from the injuries complained of.

If a proper bill of exceptions is prepared and presented to the judge within the time allowed, his delay in signing and causing it to be filed will not deprive the party of its benefit.

Appeal from a judgment of the Dearborn County Circuit Court, for plaintiffs, in an action for personal injuries. Reversed.

The facts are stated in the opinion.

C. A. Beecher, H. D. McMullen and *Percy Werner* for appellant.

Omar F. Roberts, George M. Roberts and *C. W. Stapp* for appellees.

Mitchell, J.—Lizzie Cosby and her husband joined in a complaint against the Ohio & Mississippi R. Co. to recover damages for an alleged injury to the wife. The complaint charges Facts. that Mrs. Cosby having taken passage on one of the railway company's trains, arrived at Aurora, her place of destination, and having left her seat and stepped upon the first step leading from the rear platform of the car in which she had been seated, while waiting there for the train to stop, the conductor carelessly and negligently seized her by the arm, with force, while the train was in motion, without fault on her part, pulled her violently onto the platform of the depot.

Damages in the sum of $5000 are alleged to have accrued to the wife on account of internal injuries sustained by the misconduct of the conductor.

A demurrer was overruled to the complaint, after which, upon issue joined, the cause was tried to a jury with the result that a verdict and judgment were rendered for the plaintiffs.

The ruling on the demurrer is complained of. The appellant contends—the husband having joined his wife in suing for a personal injury to the latter—that as the complaint stated no cause of action in favor of both, the demurrer for want of sufficient facts was well taken.

HUSBAND JOINING IN ACTION WITH WIFE—DEMURRER TO COMPLAINT.

The general rule is, as the appellant argues, that a complaint, to withstand a demurrer, must state a cause of action in favor of all the plaintiffs. Holzman *v.* Hibben, 100 Ind. 338; Darkies *v.* Bellows, 94 Ind. 64; Parker *v.* Small, 58 Ind. 349.

An exception occurs where, as in this case, the plaintiffs are husband and wife, and the action relates to injuries to the person or character of the latter. In such cases, while it is not necessary, it is not improper to join the husband. Hamm *v.* Romine, 98 Ind. 77; Roller *v.* Blair, 96 Ind. 203; Rogers *v.* Smith, 17 Ind. 323.

The complaint was to recover for the personal injuries sustained by the wife. It embraced no cause of action in favor of the husband. It was nevertheless, under the authorities cited, not subject to demurrer on that account. That the wife might have maintained an action in her own name without joining her husband, as provided in section 5131, R. S. 1881, does not alter the case.

That a different rule is held by some of the courts may be conceded. Michigan Central R. Co. *v.* Coleman, 28 Mich. 440, and cases cited.

There was no error in overruling the demurrer to the complaint.

The correctness of the following instruction given by the court is next called in question:

"If you find for the plaintiffs, then you will determine from the evidence the amount the plaintiffs are entitled to recover, not exceeding, however, the amount demanded in the complaint, and in estimating the damages, if any are proved, you should take into consideration the injury inflicted upon the plaintiff, Lizzie Cosby, the pain and suffering undergone by her in consequence of her injuries, if any are proved, and also any permanent injury sustained by her (if the jury believe from the evidence that the said plaintiff has sustained permanent injury from the wrongful acts complained of), and also the expense of medical attendance, if any, and for loss of time occasioned by said injuries, if any is shown by the evidence."

MEASURE OF DAMAGES.

This instruction proceeded upon the erroneous assumption that the jury were authorized to include in their assessment the damages recoverable by the husband, as well as those which the wife might recover for her separate use. This was a fatal error. Presumptively the husband was entitled to maintain a separate action to recover for medical attendance, loss of service and of the society

of his wife. He could not recover for these in an action in which his wife was suing for injuries to her person, nor could such damages be recovered by them jointly. It was equally impossible, as the complaint was framed, for the wife to recover for medical attendance or loss of time. Her right was limited to recover for the injuries to her person, including pain, anguish of mind, and all such other damages as were not presumptively injuries to the husband. Long *v.* Morrison, 14 Ind. 595; Fuller *v.* Naugatuck R. Co., 21 Conn. 557; Baltimore City Pass. R. Co. *v.* Kemp, 61 Md. 74; Cregin *v.* Brooklyn, etc., R. Co., 75 N. Y. 192; 2 Wood Railways, 1245.

In Iowa, by statute, in a suit by a husband and wife for injuries to the wife, the husband may join thereto claims in his own right. McDonald *v.* R. Co., 26 Iowa, 124.

In support of the charge under consideration, it is plausibly argued that inasmuch as, under the statute of 1881, a married woman has power to incur liability for medical attendance, and since she has the right to the profits of her own labor, such attendance and loss of time constituted proper elements of damage in her favor.

That the situation of a married woman might be such that, in an action for an injury to her person, she might also recover for medical attendance and for loss of time may be conceded; but to warrant such a recovery, some special circumstance rebutting the presumptive right or the husband must be averred and proved. No claim is made of any such averments or proof. The appellant requested the court to instruct the jury that in order "to justify the assessment of damages for future or permanent disability, it must appear that continued or permanent disability is reasonably certain to result from the injury complained of."

This was a proper instruction. In C. C. C. & I. R. Co. *v.* Newell, 104 Ind. 264–277; s. c., 1 West. Rep. 890, it is said the jury may "take into consideration all the consequences of the injury, future as well as past, when the proof before them renders it reasonably certain that future loss and suffering are inevitable." That an injury may possibly result in permanent disability will not warrant the assessment of damages for a possible disability, unless it is also reasonably certain to follow.

Rulings of the court having relation to the propriety of certain hypothetical questions propounded on both sides are presented for consideration.

As these rulings involve the frame of the particular questions, rather than any principle, and as we think it scarcely possible that questions of that character could assume the same shape on a second trial, we do not consider them. For obvious reasons the ruling of the court on the motion for a new trial for newly-discovered evidence is not considered.

It only remains that we notice the insistence of appellee based

on La Rose *v.* Logansport Nat. Bank, 102 Ind. 342, to the effect that the bill of exceptions containing the evidence and instructions of the court is not in the record. The case under consideration is distingnishable from that relied upon. Besides, it may be considered that the case cited and relied upon is explained and in a degree modified by Robinson *v.* Anderson, 3 West. Rep. 677; 6 N. E. Rep. 12, where it is held that if a proper bill of exceptions is prepared and presented to the judge within the time allowed, his delay in signing and causing it to be filed will not deprive the party of its benefit.

Within this rule the bill of exceptions is properly in the record.

For the reasons given the judgment is reversed, with costs.

Action by Husband and Wife for Injuries to Wife—Damages.—Baltimore City Pass. R. Co. *v.* Kemp, 18 Ib. 220; San Antonio St. R. Co. *v.* Helm, 19 Ib. 158; Northern Cent. R. Co. *v.* Mills, 19 Ib. 160, and note.

HEWITT *et al.*

v.

ST. PAUL, MINNEAPOLIS AND MANITOBA R. CO.

(*Advance Case, Minnesota. May* 26, 1886.)

Sections 2, 3, sub-section 1, c. 1, Minnesota Laws, 1857, Ex. Sess., authorized the St. Paul, M. & M. R. Co. to change the location of its line after it should have been located and constructed, and to exercise the power of eminent domain to obtain land for the right of way so located. The act of 1862 (chap. 20, Sp. Laws, 1862), specified the times within which specified portions of the road should be built. *Held* that this act related only to the first or original locating and constructing it, and did not affect such authority.

APPEAL from the judgment of the District Court, Ramsey county.

John M. Gilman for appellants, Allie Hewitt and others.

R. B. Galusha for respondent.

GILFILLAN, C. J.—In section 2 of the charter under which this company claims (sub-chapter 1, c. 1, Laws 1857, Ex. Sess.) the corporation created is authorized and empowered "to survey, locate, construct, complete, alter, change the location of, reconstruct, maintain, and operate a railroad, with one or more tracks or lines of rails, on such route, and with such alignment and graduation as said company shall think proper," between the points designated. Section 3 authorized it to "appropriate to its sole use and control, for the purposes contemplated herein, land not exceeding two hundred feet in width, throughout the entire

STATUTORY PROVISIONS.

length of its said railroads." "Lands owned or belonging to any person or corporation may be taken and appropriated for the purposes aforesaid, and shall be valued and paid for in the manner hereinafter provided." Section 13 provides how the amount to be paid for land appropriated shall be ascertained and paid.

Here is an ample grant of power to exercise the right of eminent domain to acquire a right of way, not only for the purpose of originally locating its line, but for the purpose as well of altering and changing the location of its line. In the clauses giving authority to take land for the "purposes contemplated herein," and making provision for paying for land "taken and appropriated for the purpose aforesaid," the word "purposes" includes as well the altering, changing, relocating, and reconstructing its line, as the first locating, constructing, and completing it; so that the power granted to exercise the right of eminent domain was not exhausted by the original location of the line, and it might be again employed for the purpose of relocating it, and for the acquiring to that end of a right of way of the width specified.

The plaintiff claims that by chapter 20 Sp. Laws 1862, the time to construct and put in operation the defendant's road from St. Paul to St. Anthony was limited to January 1, 1863, and that a railroad company cannot condemn land for its use after the time for constructing its line has expired. Of course a company whose authority to build a railroad has ceased cannot condemn land for the purpose of building it; but the act of 1862, specifying the times within which specified portions of the road shall be built, relates only to the first or original locating and constructing it. It does not place any limit of time, nor does any act to which we have been referred, within which the right to relocate and reconstruct it, after it has been once located and constructed, shall be exercised; nor is any limit put as to place in relocating the general route prescribed in the charter.

ACT OF 1862 DID NOT AFFECT AUTHORITY TO LOCATE LINE.

It is conceded, and it could not well be denied, that if the defendant had authority to relocate its line, and to condemn a strip of land 150 feet wide for the purpose, the District Court got jurisdiction of the proceedings to condemn; and that by virtue of those proceedings, the title to the land in question vested in the defendant. As we have seen, it had that authority, and that would seem to dispose of this appeal. If, having relocated its line, the company still holds on to the original right of way, and so has more land in width than its charter authorizes it to hold for the purpose, that is matter between it and the State; or if the original right of way was acquired by condemnation, perhaps, between it and those from whom the land was taken for the first location, it is no concern of plaintiffs.

Judgment affirmed.

MURPHY

v.

KINGSTON AND PEMBROKE R. CO.

(11 *Ontario Reports*, 582.)

A railway company after the completion of its line sought to expropriate a piece of land not marked or referred to on any map or plan filed, or book of reference made by the company, but within one mile's distance of the terminus of the railway, as delineated on the filed plan, for the purpose of better utilizing a certain other property previously acquired by them as a passenger and freight station. *Held*,

That, under 42 Vic., ch. 9, sec. 8, sub-sec. 11 (D.), this was not permissible, there being no provisions affecting the matter in the special acts of the company. *Held*, also,

That 46 Vic., ch. 64 (D.), which empowered the company to hold and own land in any municipality through or in which the main line or any branch was carried for the erection and maintenance thereon of stations, sidings, etc., as might be necessary for the purposes of the company, did not empower them to expropriate against the will of the owner.

THIS was an action brought by Catharine Baker Murphy, as owner in fee simple of certain lands in the city of Kingston, and by John Baker Murphy, her husband, against the Kingston & Pembroke R. Co., claiming an injunction restraining the defendants from taking possession of the said lands or any part thereof, or from procuring the appointment of an arbitrator to value the said lands, and from taking any steps, or doing anything for the purpose of expropriating the same; also a writ of prohibition prohibiting the application for or the appointment of a sole arbitrator, and prohibiting the granting of any warrant authorizing the taking possession of the said land, the defendants, as the plaintiffs alleged, being about to make application to the judge of the County Court of the county of Frontenac for these purposes.

The facts of the case are stated in the judgment.

The action was tried at Toronto before Boyd, C., on May 6, 1886.

Cattanach and *Rogers* for the defendants.

S. H. Blake, Q. C., *Britton*, Q. C., and *Black* for the defendants.

BOYD, C.—The Kingston & Pembroke R. Co. was incorporated in 1871 by 34 Vic., chap. 49 (D.), with power to lay out, construct and finish a road from within the limits of the City of Kingston to and into the town of Pembroke. (Sec. 2.)

FACTS.

By 42 Vic., chap. 61 (D.) (1879), power was given to build branch lines at any point from the main line in Lennox and Ad-

dington to some place in Lanark to connect with the Canada Central R., with a proviso that the power thereby granted should not be exercised till the main line of the railway, to connect with the Canada Central R., was constructed. By sec. 5 the time for the completion of the railway was extended for ten years from the passing of the act. By 46 Vic., chap. 64 (D.) (25th May, 1883), sec. 3, the company was allowed to hold and own lands and water-lot property in any municipality through or in which the main line or any branch was carried, for the erection and maintenance thereon of necessary stations, depots, curves, sidings and wharves as might be necessary for the purposes of the company. This act also empowered the company to build branch lines, among others a branch to Eganville, but only on condition that the main or a branch line of the railway was built to the village of Renfrew, in the county of Renfrew (Sec. 1.)

In 1873 the City of Kingston passed a by-law for a bonus of $300,000, one condition of which was that upon its payment the railway should obtain in fee for not less than 21 years the site for a passenger and freight station, to be located within the area bounded by North street on the north, Division street and Barrie street on the west, and Kingston harbor on the south and east in Kingston. The company by its president in January, 1873, made a declaration that the company had, by purchase in fee, obtained a site for a passenger and freight station, being lots 24 and 25, Place d'Armes, within the area specified in the by-law, and had purchased, but not yet patented, lots 21, 22 and 23 adjoining thereto for additional station room and the general purposes of the railway, and had otherwise complied with the conditions, whereupon payment was made to the company of the full amount of the city bonus.

The company, by its secretary, Osborne, advised the city of Kingston, on January 17, 1885, that the line of the Kingston & Pembroke R. Co. having been completed and open for traffic to the town of Renfrew, and connection there made with the Canada Pacific R. on December 26, 1884, the company thereupon claimed the right of exemption under the said by-law. The letter further stated as follows: "I would also state that the junction made at Renfrew constitutes the completion of the company's line, and the municipalities appointing directors will now be relieved from that duty." The reference in the last clause is to section 15 of the original charter, 34 Vic. chap. 49, which provides that any municipality which has given a bonus shall be entitled "during the construction of a railway, but not afterwards," to appoint annually a person to be a director of the company.

On May 28, 1883, the railway procured from the government of Canada a lease for 99 years of one and four tenths of an acre of the market battery, in the city of Kingston, and engaged

themselves to construct thereon the necessary passenger and freight buildings required in connection with their traffic and for other purposes connected with the railway. This is within the area designated in the first by-law granting a bonus, and for the purpose of better utilizing this lately-acquired property as a passenger and freight station, the company seek to expropriate the land of the plaintiffs. This land is not marked or referred to in any map or plan filed or book of reference made by the company although it is within one mile's distance from the old terminus as delineated in the filed plan.

COMPANY CANNOT TAKE LAND AGAINST WILL OF OWNER.

The evidence leads me to the conclusion that the company's line was constructed and completed before they sought to expropriate the land in question; and although under the act of 1883 they might be able to hold some additional land, I do not see that they can do so against the will of the owners in the present case.

No hardship is involved in this conclusion, because by the general act ample provision is made for giving relief to the company by 42 Vic., ch. 9, sec. 7, sub-sec. 18 and secs. 10 and 14 (D). These provisions give emphasis to the general rule of the court not to extend the compulsory powers of a company beyond the express words or absolutely necessary implication of the act. Lamb *v.* North London R. Co., L. R. 4 Ch. 522.

The decision which goes furthest in aid of the defendants is *Re* Yorkshire, etc., R. Co., *In re* Dylar's Estate, 1 Jur. N. S. 975, where the power to take lands for a siding was exercised, though the main line had been constructed, but in that case the land taken was within the limits of deviation delineated on the maps and plans of the company's undertaking.

DEVIATION AFTER COMPLETION OF ROAD ONE MILE LIMIT.

The language of Burns, J., in Grimshawe *v.* Grand Trunk R. Co., 19 U. C. R., at p. 505, is against the exercise of the compulsory power of deviation after the road is completed and in full operation; and although Robinson, C. J., in that case expresses the view that deviation is permissible within a mile, though the alteration is not exhibited on the map or plan, I find myself unable to extract such a meaning from the statute now in force. The important clause is in 42 Vic. ch. 9, sec. 8, sub-sec. 11 (D.), which is as follows: "No deviation of more than one mile from the line of the railway, or from the places assigned thereto in the said map or plan and book of reference, or plans or sections, shall be made into, through, across, under, or over any part of the lands not shown in such map or plan and book of reference, or plans or sections, or within one mile of the said line and place, save in such instances as are provided for in the special act."

No provision being made for deviation in any of the special acts relating to this company their right to expropriate the land in

question does not exist unless it be given by virtue of the provision which I have cited from the general act.

Now the intention of the legislature is to be ascertained by applying the usual rules of grammatical construction unless some such absurd or incongruous results ensue as necessitate a modification of these rules. The obvious meaning of the sub-section in hand appears to me to be this: The limits of deviation shall not exceed one mile from the line of railway in the case of lands not shown in the plans and books of reference or the alterations thereof; but even within one mile from the said line no deviation shall be permitted, except in such instances as are provided for in the special act. This may be a cumbrous and possibly tautological way of expressing what is meant, but it yields a sensible meaning. I am not, therefore, to torture the words into other combinations which will give a more favorable result to the railway authorities.

I suspect there is an error somewhere in the composition of this sentence. I notice that in the original whence it passed into the Consolidated Statutes of Canada and the General Railway Act, 1872, it has a change of one word which may alter the meaning, if possible, more to the disadvantage of the company. In 14 and 15 Vic. ch. 51, sec. 10, it for the first time appears thus: "No deviation of more than one mile from the line of railway or from the places assigned thereto, etc., shall be made, nor into, through, across, under, or over any part of the lands not shown on such map or plan and book of reference, or within one mile of the said line and place, save in such instances as are provided for in the special act." It seems to be clear from this language that no deviation is to be made into any land not shown on the plan and book of reference, which would be fatal to the company's contention.

The construction of this section was not brought to my notice when I gave an opinion upon a former application as to the meaning of the word "deviation." I adhere to that meaning, but I do not see that it gets rid of the other difficulty in the way of the defendants, namely, that they have no power to take this land against the will of the plaintiffs. This suffices to dispose of the case, and I do not deem it needful to consider the other matter argued before me. The judgment will be in favor of the plaintiffs as prayed, with costs.

MATTER OF APPLICATION OF STATEN ISLAND, ETC., R. CO. TO ACQUIRE LANDS.

(*Advance Case, New York. October* 5, 1886.)

The mere fact that the land proposed to be taken for a public use is not needed for the present and immediate purposes of the petitioning party is not necessarily a defence to a proceeding to condemn it.

Where such use is not required for the purpose of the local traffic of the petitioning railroad company, but for the purpose of enabling it to fulfil the obligations of a contract made with a foreign railroad company, whereby it has bound itself to furnish to such company accommodations over its road, the object for which the land is sought will be deemed a public use.

APPEAL from an order of the general term affirming an order authorizing the petitioner to acquire certain lands for the purposes of its road. The application was opposed upon the ground that the lands proposed to be acquired were not needed for the purposes of the petitioner, and that the alleged connection to be made between it and a foreign railroad corporation, which would so increase the traffic upon the petitioner's road as to make the land in question necessary to its use, was conjectural and uncertain.

D. O'Brien, attorney general, *A. Schoonmaker* and *Thos. W. Fitzgerald* for appellant.

Stewart & Boardman for respondents.

QUESTION PRESENTED BY THE RECORD.

RUGER, Ch. J.—Many of the questions discussed in the learned brief of the appellant's counsel do not seem to be open for consideration here, as they were neither raised in the court below nor authorized by the order under which they were permitted to defend. Aside from a request to dismiss the proceedings upon the ground of indefiniteness in the description of the land proposed to be taken, and which is not now raised by counsel, we find no objection in the record to the adjudication under consideration, except that of the alleged insufficiency of the evidence, to show that the property proposed to be taken was required for the purposes of the petitioning corporation. A motion was made to dismiss the petition for that reason, which was denied, and the appellant excepted to this decision. This exception presents the only material question exhibited by the record before us.

The appellant was restricted to this ground of objection by the terms of an order vacating *pro tanto* an adjudication already made in the proceedings, and was, therefore, precluded from raising any other ground of defence. Questions as to the corporate organization of the petitioning company, its action in authorizing these proceedings, the right of a railroad company to acquire lands under navigable water as against the State, and the rights and interests of littoral owners in such lands are, therefore, all excluded from the controversy by the terms of the order opening the appellant's default.

The original order of condemnation appointing commissioners to appraise the value of the land proposed to be taken constituted an adjudication in favor of the respondent upon the questions involved, disposing of every question which might have been raised in opposition thereto except that allowed to be litigated by the order referred to.

It was conceded by the petitioners upon the hearing that the lands in question were not required for the present uses, and it is strenuously contended therefrom by the appellant that the petitioner has not made a case for condemnation, or such a case as establishes a reasonable probability that such lands will be required for its uses in the future.

FACT THAT LAND IS NOT NEEDED FOR PRESENT USE IS NOT A DEFENCE.

It is quite obvious that the beneficial exercise of the power of acquiring property for public uses cannot be enjoyed unless allowed in anticipation of the contemplated improvement, and it is, therefore, well settled in this State that the mere fact that the land proposed to be taken for a public use is not needed for the present and immediate purpose of the petitioning party is not necessarily a defence to a proceeding to condemn it.

The statute authorizing the formation of railroad corporations confers power upon such as are organized under its provisions to acquire lands by the exercise of the right of eminent domain, not only from individuals, but also from the State, for its prospective as well as present uses, provided its necessities for such use in the immediate future are established beyond reasonable doubt. Lansing *v.* Smith, 8 Cow. 146; s. c., 4 Wend. 9; Laws of 1850, chap. 140, § 21; Rens. & Sar. R. *v.* Davis, 43 N. Y. 137; In the Matter of the N. Y. C. & H. R. R. Co., 77 Id. 249. The exercise of this power is in derogation of individual rights, and is always burdensome, and often injurious to the owner beyond the power of pecuniary compensation to wholly redress, and should be allowed only when the necessity for the land clearly appears, and its proposed use is clearly embraced within the legitimate objects of the power.

The only question, therefore, in the case is whether the evidence shows such a case as renders it probable that these lands will be

required within a reasonable period for the uses of the petitioning corporation.

No evidence was offered by the appellant upon the question at the trial, and it relies wholly for its defence upon the insufficiency of the proof given by the petitioner to establish a case for condemnation. The Special Term found as a fact that the land was required by the petitioner for the purposes of its incorporation, to wit: For tracks, switches, sidings and depot grounds, whereon cars may be moved, loaded and unloaded, stored, received and dispatched; for freight sheds, wherein freight may be received, and stored, and then loaded into cars and delivered to consignees, and for necessary terminal grounds, for the purpose of the incorporation of said company, and for the purpose of constructing and operating its railroad. It was further found that such use was not required for the purpose of its local traffic, but for the purpose of enabling it to fulfil the obligations of a contract made between it and the Baltimore & Ohio R. Co., whereby it had bound itself to furnish to such company accommodations over its road for transporting freight, passengers, express and mail matter between the proposed termini of such Baltimore & Ohio road, at Elizabethport, in New Jersey, to and from the city of New York. We think the evidence fully supported these findings.

PURPOSES FOR WHICH LAND WAS REQUIRED —CONNECTION WITH OTHER ROAD.

The proof shows that the petitioner is a domestic railroad corporation operating a line of road on Staten Island, which has been mainly used heretofore for local purposes, but which it is now proposed to utilize as a connecting link between the system of railroads known as that of the Baltimore & Ohio and the port and city of New York. The vast increase of business which such a connection will occasion to the petitioner's railroad, and the necessity of increased facilities for handling it, is too obvious to be disputed. The benefit to be derived from such a connection, not only to the public, but also to the petitioner, is clearly apparent from the evidence, and renders the object for which the appropriation of the land in question is sought a public use within the meaning ascribed to that term by the decisions of this court. *In re* N. Y. & H. R. R. Co. *v.* Kip, 46 N. Y. 547; *In re* N. Y. C. & H. R. R. Co., 77 Id. 263.

The fact that the condemnation of the land in question is also earnestly desired by a foreign railroad corporation, and will inure largely to its benefit, furnishes no reason for denying the relief asked for by the petitioner, provided it has brought itself within the language of the statute authorizing such a proceeding. Matter of Petition of N. Y., L. & W. R. Co., 99 N. Y. 21.

It is claimed that because certain structures which are required to be built in order to form the connection between the two sys-

tems of railroads are not yet begun, or completed, that their construction is conjectural and uncertain, and does not afford a sufficient degree of probability of their ultimate construction as authorizes the court to condemn the property in question for its proposed uses. The principal structures referred to are the extension of the petitioner's railroad over a bridge or viaduct, to be erected across Arthur's kill, which divides Staten Island and New Jersey, and the building of a railroad track by the Baltimore & Ohio R. Co. from Bound Brook to Elizabethport, in New Jersey, a distance of about sixteen miles, connecting the roads of the contracting parties. The evidence shows that the petitioner is bound by its contract with the Baltimore & Ohio R. Co., to construct such bridge and perfect its facilities for accommodating the increased traffic within one year from the date of the contract, viz., October 28, 1885, unless obstructed and delayed by hostile legal proceedings, or want of lawful authority to do so, and in case of delay from such causes, then with all reasonable diligence after such obstacles have been removed and authority obtained. The same contract provides that the Baltimore & Ohio R. Co. shall within one year from the date thereof, or if delayed by hostile legal proceedings, with all reasonable diligence, perfect its connection at Elizabethport with the railroad of the petitioners. It thus appears that the contemplated connection between the petitioners' railroad and the vast system of railroads controlled by the Baltimore & Ohio company is assured by contract obligations between parties interested in making such connection, and presumptively able to comply with their obligations if no legal obstacles prevent. It also appears that the contracting parties have already built and leased lines stretching over several hundred miles for the purpose of carrying out the purpose in view, and that the Baltimore & Ohio R. Co. has already, in the performance of its contract, assumed liabilities for the Staten Island Rapid Transit R. Co. to the amount of $2,500,000, and has advanced and expended money in the purchase of property on Staten Island and elsewhere, and in extending its tracks for the purpose of the traffic contemplated to be carried on over the petitioners' road of upwards of $1,000,000. The pecuniary expenditures made, and the liabilities assumed by both of the contracting parties, as well as the manifest interest which both of them have in carrying into effect the projected enterprise, afford the most conclusive assurance that this application is made in good faith, and for the sole purpose of acquiring property for the use of the petitioning railroad company. All of the testimony taken on the hearing concurs as to the necessity of the appropriation of all of the property described for the proposed use, and we have been referred to no circumstance appearing in the case which seems to cast any suspicion upon the motives of the petitioner in preferring the application.

SUFFICIENT DEGREE OF PROBABILITY THAT CONTEMPLATED STRUCTURES WILL BE ERECTED.

While the limitations under which the respondent is permitted to defend this proceeding do not permit it to raise any questions as to the authority of the court to entertain the proceeding and grant the relief sought, it may be proper to say that it seems to be fully authorized by sections 21 and 25 of the general Railroad Act, and the cases of Lansing *v.* Smith, 8 Cow. 146; S. C. Appeal, 4 Wend. 9; Gould *v.* Hudson R. R. Co., 6 N. Y. 524, and the Matter of the Application of the N. Y. C. & H. R. R. Co., 77 Ib. 248.

It is also proper to say that the enactment by Congress, during its last session, of a bill authorizing the contracting parties hereinbefore referred to to build a railroad bridge or viaduct across Arthur's kill, has apparently removed any legal objections to such a structure, and rendered it quite certain that the connections contracted for between such parties will be made, and the property sought to be obtained by this proceeding devoted to the purposes alleged in the petition.

The order should be affirmed with costs.

All concur, except MILLER, J., absent.

Order affirmed.

Condemnation of Land for Future Use.—A corporation may condemn more land than it at present needs, but only what may in good faith be presumed to be necessary when traffic shall be extended. Mills on Eminent Domain, § 58.

In taking possession of land under the Pennsylvania Act of March 17, 1869, a railroad company is not confined to the present needs of its business, but may properly provide for the future requirements of a more extended traffic. Lodge *v.* Philadelphia R., 8 Phil. 845.

Accordingly, where a railroad company have one of the termini of its road upon a navigable water-way extending into the territory of a foreign power, in its application for the acquisition of certain lands situate on the shore of such water-way near the side terminus alleges as a prominent reason for their condemnation that a charter had been granted by such foreign government for the construction of a ship canal connecting the said water-way with other navigable waters, which, when completed, would greatly increase the business of the railroad, and that the lands were needed for the construction of slips and docks for the accommodation of vessels bringing freight to or taking it from the said road, and of tenements for the employees of the railroad and to meet the requirements of the anticipated business; and it appeared from the proofs that the company already had, at such terminus, a convenient and accessible water front and docks, which were used but in part, and were capable of extension on its own premises, and it did not appear that the work on the ship canal referred to had been commenced or that the capital to construct it had been secured, *held*, that it was not sufficiently shown that the lands were required for the present or prospective business of the corporation within the meaning of the statute, and they could not be taken against the will of the owner. Rensselaer & Saratoga R. Co. *v.* Davis, 43 N. Y. 137.

PORTLAND AND WILLAMETTE VALLEY R. CO.

v.

CITY OF PORTLAND.

(*Advance Case, Oregon. November* 29, 1886.)

An action was brought by the plaintiff company against the city of Portland, under an act of the legislature of Oregon, to condemn what is known as the "Public Levee," in the city of Portland, to its use for a depot and other purposes. The levee had been unconditionally dedicated to the public use, as a public landing. *Held*, that the things authorized to be done under the act were not inconsistent with the use of the levee as a public landing, and hence the legislature had the power to regulate its use, or devolve it upon the defendant or the plaintiff, as its agent, in conformity with the purposes of its dedication, without the consent of the city, and without compensation to it.

Action to condemn and appropriate what is known as the "Public Levee," in the city of Portland, to the use of the plaintiff, for the purposes stated in the act of the legislative assembly of Oregon, session 1885. Judgment for the plaintiff. The city appealed. The facts are stated in the opinion.

McDougal & Bower for appellant.

A. H. Tanner, City Att'y, for respondent.

LORD, C. J.—This action was brought under an act of the legislative assembly to condemn and appropriate what is known as the "Public Levee," in the city of Portland, to the use of the plaintiff for the purposes therein stated. Sess. 1885, p. 100. It appears from the act that originally the piece of land in dispute was dedicated to the public use, as a levee or public landing, by Stephen Coffin, who subsequently, by deeds in 1865 and 1871, which were duly recorded, conveyed the same to the city of Portland. What right of estate remaining in Coffin after the dedication was intended to be conveyed by these deeds is not disclosed by the act or this record. It was assumed, however, in the argument and in the brief, that the city held the levee tract in trust, for the use of the public as a leave or public landing. The act itself is justly deserving of the criticism to which Mr. Justice Deady subjected it. As he said, "it is largely a mass of senseless and redundant verbiage," and this applies directly and forcibly to all that part of the act devolving upon us to consider. See Coffin *v.* City of Portland, 27 Fed. Rep. 418. FACTS—PROVISIONS OF ACT.

Among other things, the levee tract is granted to the plaintiff by

the act "to be held, used, and enjoyed for occupation by track, side track, water stations, depot buildings, wharves, warehouses, and such other buildings and erections, of such form and manner of construction, as may be found requisite, necessary or convenient in receiving, shipping, and storing of produce, goods, wares, merchandise, and, generally, of all kinds of freight, and for use generally, and in the manner usual and ordinary for depot purposes, and, as such, to be under the exclusive management and control of the owners of said railroad," etc., and with power to sell the same "as appurtenant to said railway," etc., and that "said company shall never charge dockage to any boat, ship, or vessel while actively engaged in receiving or discharging cargo at the wharf which may be erected on said premises," etc.

It would not be difficult to give this language a construction so as to effect a purpose which the legislature could not authorize. But it does not follow that the act is void because something might possibly be attempted under it, and seem to be covered by it, in consequence of the broad language used, which the legislature could not give a legal right to do. It is our duty, if the act will admit of a construction which will justify it, to sustain it. The intendments in favor of validity of an act of the legislature must prevail, unless its provisions are necessarily void. "The main purpose and purport of the act was succinctly stated by Mr. Justice Deady in Coffin *v.* City of Portland, 12 Pac. Reptr., in which he said that the act was "a grant or license to the Portland & Willamette Valley R. Co., then and now engaged in constructing a road between Portland and Dundee; the use of the levee for a depot, and the wharves and warehouses necessary and convenient for receiving, storing, and shipping freight, on condition, among others, that said company shall not charge any vessel for 'dockage' while receiving or discharging cargo at any wharf on the premises."

CONSTRUCTION TO BE GIVEN TO ACT.

It is contended, principally, (1) that the act is void in authorizing the plaintiff to do what the legislature is without power to authorize; and (2) that it is void, because the use to which the act devotes the property, or authorizes the plaintiff to devote it, is inconsistent with the use to which it is already dedicated.

The plenary power of the legislature over public corporations, except as to vested rights of property and of creditors, is indubitably established. Dartmouth College Case, 4 Wheat. 519; 2 Kent, Comm. 305. "Municipal corporations," said Dillon, C. J., "owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so it may destroy. If it may destroy, it may abridge and control. Unless there is some constitutional limitation on the right, the legislature might, by a single act, if we can suppose it

POWER OF LEGISLATURE OVER PUBLIC CORPORATIONS.

capable of so great a folly, and so great a wrong, sweep from existence all the municipal corporations in the State, and the corporations could not prevent it. We know of no limitation on this right, so far as the corporations themselves are concerned. They are, so to phrase it, mere tenants at will of the legislature." City of Clinton *v.* Cedar Rapids & M. R. Co., 24 Iowa, 456.

But while the municipality exists, as to private property which it may have been allowed to acquire under its charter, such property is, doubtless, as much protected by the constitution as the private property of the citizen. Nor can the legislature deprive the city of such property, except it be for public use, and only then upon just compensation. But the easement or property which the city has in public streets or public places is of a different character. It is not private property of the city; nor can the city sell or use it for other than proper public purposes. The city might sell its market-house, or appropriate it to some other municipal use; but it cannot sell its streets, nor use them for other than legitimate purposes connected with such use. Over these—all streets and highways and public places and their uses—the plenary power of the legislature, in the absence of special restrictions, has been often asserted in several leading cases.

SAME—RIGHT OF MUNICIPALITY TO CONTROL ITS PROPERTY—AUTHORITIES.

In Com. *v.* Erie & N. E. R. Co., 27 Pa. St. 354, Black, C. J., said: "The right of the supreme legislative power to authorize the building of a railroad on a street or other public highway is not now to be doubted. It has been settled, not only in England (King *v.* Pease, 4 Barn. & Adol. 30), but in Massachusetts (Newburyport Turnpike Corp. *v.* Eastern R. Co., 23 Pick. 328), New York (Drake *v.* Hudson River R. Co., 7 Barb. 509), and in Pennsylvania (Philadelphia & T. R. Co.'s Case, 6 Whart. 43). If such conversion of a street to purposes for which it was not originally designed does operate severely on a portion of the people, the injury must be borne for the sake of the far greater good which results to the public from the cheap, easy, and rapid conveyance of persons and property by railway. The commerce of a nation must not be stopped or impeded for the convenience of a neighborhood."

The interest in the use of streets and highways and public places and their uses being *publici juris*, the power of regulating such use is in the legislature, as the representative of the whole people. It is a part of the political or governmental power of the State, in no way held in subordination to the municipal corporation. It has therefore been held in many cases that the legislature has the power to authorize the building of a railroad on a street or highway, and may directly exercise this power, or devolve it upon the municipal authorities. Moses *v.* Railway Co., 21 Ill. 516; Murphy *v.* Chicago, 29 Ill. 279; Mercer *v.* Railroad Co., 36 Pa. St. 99; Springfield *v.* Rail-

AUTHORITY OF LEGISLATURE OVER PUBLIC STREETS.

road Co., 4 Cush. 63; People *v.* Kerr, 27 N. Y. 188; Lackland *v.* Railroad Co., 31 Mo. 180; City of Clinton *v.* Railroad Co., *supra.*

The decisions, however, are not entirely harmonious, where the public have only an easement in the street or highway; and in some of the cases it has been held, as against the proprietor of the soil, the use of the street or highway for the purposes of a railroad created an additional burden of servitude, which, under the constitution, he could not be deprived of without compensation, Ford *v.* Chicago & N. W. R. Co., 14 Wis. 616; Pomeroy *v.* Milwaukee & C. R. Co., 16 Wis. 640; Gray *v.* St. Paul & P. R. Co., 13 Minn. 315 [Gil. 289]; Williams *v.* Natural Bridge P. R. Co., 21 Mo. 580; and this Judge Cooley says appears to be the weight of the authority. Cooley, Const. Lim. 549. But where the fee of the streets is in the city corporation, and not in the adjoining owner, a different rule has been applied. Moses *v.* Pittsburgh, Ft. W. & C. R. Co., 21 Ill. 516; Protzman *v.* Indianapolis & C. R. Co., 9 Ind. 467; People *v.* Kerr, *supra;* City of Clinton *v.* Cedar Rapids & M. R. Co., *supra;* Lexington & O. R. Co. *v.* Applegate, 8 Dana, 289. See also Cooley, Const. Lim. 555, and notes.

It may be—it is not necessary for us to decide the question—that private citizens owning adjoining property may have such rights or estate in or to the use of streets or public places over which the power of the legislature is not supreme or plenary. Whatever their rights may be we are not required to consider upon this record. They are not parties, and their interest cannot be affected by this proceeding. All that we are required to consider is the rights of the defendant, a municipal corporation; and, as we have seen, these rights the defendant holds subject to the supreme will of the legislature, as the representatives of the people, and that, so far as regards defendant, its streets and public places, and their uses, are not the private property of the municipality, in the sense that the legislature cannot authorize the same to be used for a public purpose, unless it make compensation to the city for such use.

In People *v.* Kerr, *supra*, Emott, J., said: "The title [in the streets] thus vested in the city of New York is as directly under the power and control of the legislature, for any public purpose, as any property held directly by the State, or any public body or officers, and its application cannot be challenged by a corporation [the city] which, in respect to such property at least, is a mere agent of the sovereign power of the people." And, in concurring, Wright, J., said: "I am clearly of the opinion that the city corporation has no property in the streets of a character to be protected by the constitutional limitation on the right of eminent domain."

The principle deducible from these authorities is that when property is acquired by the exercise of the right of eminent domain, on payment of its value from the public funds, or by

dedication under a statute, where the fee to the soil passes out of the dedicator, over the use of such property, so far as the municipal corporation is concerned, the legislature possesses unlimited control. It is immaterial whether the fee of the street is in the public, or in the city, in trust for the public, as then the city would not hold the fee for itself or its inhabitants only, but for the public generally, including its own inhabitants. The power of the legislature to authorize the use of the same by a railroad, without the consent of the city, and without compensation to it, is undeniable. The reason is plain: the streets are not the private property of the corporation. It owns no property in them in the sense, or of a character, to be protected by the constitutional limitation on the right of eminent domain. It results as a consequence of the unlimited power of the legislature, in the absence of special restrictions, not only over the existence of the municipality, but, while it allows it to exist, over its streets and public places, held for the use and benefit of the general public. By analogy these principles of the law are alike applicable to other property held by the city for the general public, such as levees or public landings. Unless there is something in the particular facts and circumstances to take such property, devoted to public uses, out of the operation of these general principles, it will be governed and controlled by them.

In the case now in hand the levee was unconditionally dedicated to the public use as a public landing. When this was done, there remained in the dedicator a legal title, to which, so to speak, was attached, and belonged to him, every right of use or of property not inconsistent with the use he had given to the public. In a word, it may be used for the use to which he dedicated the property, viz., as a levee or public landing. Any other use inconsistent with that use belongs to him. To this property thus dedicated to the public use the dominion of the legislature is attached, but its power over it is not supreme. It might regulate its use or promote its improvement, but it could not divert or subject it to any use clearly inconsistent with the purposes of its dedication. To do that would violate the contract of dedication, and any person interested would be authorized to institute proper proceedings to enjoin it. Nor is it perceived that, so far as regards the defendant corporation, the holding of the title by it, in trust for the use of the general public, as a levee or public landing, makes any difference. The corporation holds only in trust, in subordination to the contract of dedication, for the use of the general public, as a levee or public landing. The city does not own it, nor can it sell or dispose of it, or divert it to any private use. Such a title is a holding for a public use; is public property, to be used in subordination to the use for which it was dedicated, and is not private or municipal property. To this extent, then, it may

INTEREST OF CITY IN THE LEVEE.

be said that whatever interest or estate the city may hold in the levee is essentially and wholly public, and not private, property, and that the city in holding it is the agent or trustee for the public, and not as a private owner for profit. It is a title conferred on it by the dedication for the benefit of the public to the uses granted, and not of private ownership, which comes within the constitutional limitation on the right of eminent domain.

It results that the legislature may regulate its use, or devolve it upon the defendant or the plaintiff, as its agent, in conformity with the purposes of the dedication, without the consent of the city, and without compensation to it. The legislature may therefore authorize the doing of the things by the plaintiff prescribed by the act, within the limitations indicated. It cannot itself do, nor authorize the defendant or plaintiff, nor can either of them do, anything to divert or subvert the use to which the levee is already dedicated. The things to be done under the act must be consistent with the use of the levee as a public landing, and it is only in this sense that the act can be upheld. Are the things authorized to be done under the act clearly inconsistent with the use of the levee as a public landing? As we have construed the act, it only, in effect, purports to grant to the defendant—to adopt the language of Mr. Justice Deady—"the right to improve and use the premises as a public landing, with the added facility of direct and immediate railway connection therewith."

SAME—LEGISLATURE MAY REGULATE USE.

Now, will not the construction of wharves and warehouses, at which vessels may load and discharge cargo, be rather an improvement of its use as a levee or public landing, than its subversion as such? Are not these things, in fact, necessary and essential to afford proper facilities to the public, and make the levee of any value and benefit as a public landing? Are they not in accord with the general purposes for which the property was dedicated? Do they not, in fact, contribute to give it more identity as a public landing, and render the use it was dedicated to serve more beneficial to the general public? Nor does the construction of a depot thereat, in connection with the railway, subvert or destroy its use as a public landing; nor is it inconsistent therewith, but, within proper limitations, it may tend to improve and make the use of the levees, as such, more beneficial. "A 'landing' is a place on a river or other navigable water for lading and unlading goods, or for the reception and delivery of passengers." State *v.* Randall, 1 Strob. 111. "It is either the bank or wharf to or from which persons or things may go from or to some vessel in the contiguous waters." State *v.* Graham, 15 Rich. 310. See, also, Coffin *v.* City of Portland, *supra*.

Now, are not all these things, and may they not be so construed —wharf, warehouse, and depot—as proper incidents to a public landing, which improve and facilitate its use, extend its benefits to

a larger public, and make it more suitable for the accommodation of passengers, and the stowing and shipping of general freight? The legislature, as the representative of the general public, has the right to regulate its use, and improve the same, consistent with the purposes of its dedication; and it may do this directly, or authorize the defendant to do it as the agent of the State.

If then, these structures may be built to improve the landing, and make its use more beneficial to the general public, and are not inconsistent with the use to which the levee was dedicated, what right in this property of the city, as trustee, is affected, which entitles it to compensation, or to be protected by the constitutional limitation on the right of eminent domain? As Mr. Justice Deady said: "As Portland has no 'pecuniary' or other right in this property, except as trustee, and then only as far as the legislature may provide or permit, it is not apparent what claim it can have for damages in consequence of the appropriation to such uses and purposes." But my associates, while not disagreeing as to this result on the theory of condemnation, suggest and think that it was the intention of the legislature by the act to indemnify the city for any improvements—money expended on the levee, paid out on the same—or interest acquired by the deeds (which is not disclosed by this record), as damages, and that the proceeding, although in the form of condemnation, is for this purpose; and that in such case the State has a right to prescribe such conditions, although, without manifest intention to indemnify, the result would be otherwise.

CITY NOT ENTITLED TO COMPENSATION.

The judgment must be reversed and the cause remanded for further proceedings.

Condemnation of Land already Devoted to Public Use.—See Baltimore & O. R. Co. *v.* North *et al.*, 23 Am. & Eng. R. R. Cas. 36.

PEIRCE

v.

BOSTON AND LOWELL R. Co.

(*Advance Case, Massachusetts. April* 16, 1886.)

Where a railroad is in possession of premises appropriated to its use in the exercise of a public franchise, the owner of the fee of the land appropriated has no right to interfere so long as the use is continued for the purposes of the franchise.

It is not until it substitutes another use for that given by its franchise, so that its possession of the land is wrongful, that its occupation can be referred to the claim of the freehold.

Hence, where a railroad company occupied a portion of the land appropriated to its use for depot and station purposes, the manner of its use for these purposes is in its discretion; and it is no concern of the owner of the fee. Even if it exceeds its franchise in the manner of such occupancy, it does not thereby disseize the owner of the fee, nor authorize an action for trespass by him, nor justify a demand for damages for rents and profits for such use and occupation.

WRIT of entry. On report. Judgment for tenant.

Defendant was the owner of the premises described in the writ, and of other large tracts of land in the neighborhood. She had her home place, consisting of a dwelling-house and a barn, near the demanded premises. The tenant succeeded to all the rights and duties of the Middlesex Central R. Co. On the 1st day of January, 1879, the Middlesex Central R. Co. filed a location of an extension of its railroad in the town of Concord, and took thereby about three acres of demandant's land. On October 31, 1879, said company, under Statute 1874, ch. 372, §§ 58, 60, the county commissioners of Middlesex county having prescribed the limits thereof, took and filed a location upon about two acres more of demandant's land, adjoining the foregoing, for depot and station purposes, which are the premises described in the writ. Damages for each of said takings were thereupon duly assessed and paid. The tenant thereafter built on the most westerly end of the two acres so taken for depot and station purposes a large building, three stories high, with a cellar. This building was immediately opposite the main entrance of the State prison, and access to the two upper stories thereof was had through a large central door opening on the southerly side of the building towards the prison. These two stories contained seventeen chambers. The ground floor contained a room at the westerly end, opening on the northerly side onto a platform adjoining the track of the railroad, and on the southerly side onto the highway. This room was adapted for and intended to be used as a waiting-room for passengers. Adjoining it was an office for the station-master and a toilet-room for ladies. An entry led from the waiting-room into two large rooms, connected by folding-doors. In the center of the building, and to the east, there was another small room for a carving-room, and beyond this a kitchen. The tenant furnished the waiting-room and office, and connected the rest of the building with a furnace in the cellar, but did not furnish the rest of the rooms in the building. On the easternmost end of said two acres the tenant erected an engine-house, fitted to house three locomotive engines. It erected a stable upon said lot, with accommodations for horses and for the storage of carriages and hay, and, adjoining the stable, a piggery. There was not at the time of the erection of said buildings, nor has there been since, any tavern or other place where passengers over said railroad could obtain meals, lodging or other accommodations, within some two

miles of said building, which was at the terminus of the railroad. Since January 24, 1880, the tenant has occupied the waiting-room, the office and toilet-room of the first-named building for depot and station purposes connected with its railroad.

The occupation of the said two acres other than as above stated has been as follows: Since January 24, 1880, the tenant has employed a depot-master, whose duty was to attend to the passenger, freight and telegraph business of the railroad at that place, who was given by the tenant the whole use, income and improvement of those portions of said first-named building not used for depot purposes as above stated, and the use for garden purposes, of about 1¼ acres of said two acres, and the use of said stable and piggery. The depot-master furnished the seventeen chambers with beds and furniture, the two central rooms on the ground floor with chairs and tables, and the kitchen with its furniture, and has had an average of twenty lodgers and boarders, more or less permanent, a large proportion of whom were officers and instructors in the State prison, and their families, and some of whom from time to time were employees of the railroad company. Regular meals were furnished daily, without reference to the times of arrival or departure of trains, and there were no special appliances for transient travellers to obtain meals.

The depot-master kept in the livery stable two horses to let for hire, and baited such transient horses as from time to time came there, both for persons who visited the prison and for those who took trains on the railroad. He kept pigs in the piggery, and to a limited extent cultivated and took crops from the land.

At the trial the demandant offered the record of the conviction of Warren K. Snow, who was the depot-master in 1882, for the illegal sale of intoxicating liquors upon the demanded premises. This evidence was excluded and the demandant excepted.

The gross receipts for passenger and freight business at the station have averaged about $175 per month since its occupation; and the passenger travel has been very small.

After the demandant had offered evidence as to the rents and profits received by the tenant from the use of the building first named, the tenant was permitted by the judge, against the demandant's objection and exception, to show that the said building cost $6275, including the furnace; but as he did not adopt the demandant's view, that her damages in this action depended in any measure upon the rents and profits so described, he had no occasion in his ultimate finding to consider either the income from or the cost of said building.

This was substantially all the evidence in the case, and was reported at the request of the parties.

The court held that the tenant had only an easement in the land, and not a freehold estate; and their right of occupation was limited

to such use of the premises as was warranted by their charter and the statutes, and was reasonably necessary to their exercise of the privileges and functions thereby conferred, and made no special findings of specific facts of misuse; but, upon the whole case, found as a fact that the tenant had exceeded the lawful use of the demanded premises, and had asserted rights in and done acts upon the premises not justified by the authority given it as aforesaid. The court therefore found that the plea was falsified, and that the demandant was entitled to a qualified judgment, subject to all rights of the tenant under its charters and locations; and ruled that the demandant was entitled to recover, as rents and profits since January 24, 1880, the clear annual value of the land without any buildings thereon, subject to the right of the tenant to its exclusive possession for railroad uses under its charter and locations, and assessed the rents and profits at $103. The case is now reported by the agreement of parties for the determination of the supreme judicial court as to the law involved.

A. A. Strout and *W. H. Coolidge* for tenant.

S. Hoar for demandant.

WHETHER DEMANDANT WAS DISSEIZED—RIGHTS OF TENANT.

W. ALLEN, J.—The tenant has all the rights in the demanded premises which are given to a railroad corporation in land taken for depot and station purposes under Statute 1874, ch. 372, § 60, Pub. Stat. ch. 112, § 9; and the demandant has all the rights of the owner in fee for whom the land was so taken. The tenant has disclaimed all the title except to an easement, and thus admitted of record all the title which the demandant has. So far as affects the title, it is immaterial whether judgment on this issue be for the demandant or for the tenant. If, however, the demandant can show that she was in fact disseized by the tenant, she will show that the writ was rightly brought, and will be entitled to costs of the suit, and may recover damages for mesne profits.

It was decided in Proprietors of Locks and Canals *v.* Nashua, etc., R. Co. 104 Mass. 1, that a railroad corporation might disseize the owner of the land over which its road was located by doing acts upon the premises not justified by its rights under its location, and which implied a claim of title or required a title for their justification. The court says: "When there is a right which authorizes the party defendant, for certain purposes, to disturb the soil or occupy the land, acts done in apparent conformity therewith, or even of an equivocal nature, will be referred to that special right, although, in the absence of such authority, the demandant would be entitled to regard the acts as an assertion of title and a disseizin of himself. In respect to lands taken by railroad corporations, although the discretion of the directors is unlimited as to the mode and extent of the use or occupation for the purpose for which the

corporation was erected, yet it is definitely limited by those purposes. Any use of the land confessedly for other purposes, or not apparently for purposes permitted by its charter, is not protected by its authority." We have only to adapt the rule of that case to the facts of the case at bar, and inquire whether the acts of the tenant were for purposes other than those for which it might lawfully occupy the land, and amounted to an assertion of the title and an assumption of seizin in fee.

RIGHT ACQUIRED BY RAILROAD OVER RIGHT OF WAY.

Statute 1874, ch. 372, § 52, Public Statutes, ch. 112, § 88, provided that a railroad corporation might lay out its road not exceeding five rods in width. This gave to the corporation the absolute right to impose the easement of a right of way upon the land, but no authority to take the land itself. It is the right acquired by the laying out of the road under this provision of which it was said that it, "though technically an easement, yet requires for its enjoyment a use of the land permanent in its nature and practically exclusive." Hazen *v.* Boston, etc., R. Co., 2 Gray, 580.

The only limit to the use which the corporation may make of the land is that it shall be a use authorized by its act of incorporation. Within that limit the manner in which the land shall be used and occupied is in the discretion of the corporation. Proprietors of Locks, etc., *v.* Nashua, etc., *ubi supra*, and cases there cited.

But the rights of the tenant in the demanded premises are not merely those acquired by the location of its road. The section of the statute already referred to further authorizes the corporation, for the purpose of cuttings, embankments, and procuring stone and gravel, and for depot and station purposes, to purchase or otherwise take, in the manner afterwards provided, as much more land as may be necessary for those purposes. Subsequent sections provide the manner in which such land may be taken; if the corporation is not able to agree with the owner, it may apply to the county commissioners, who shall prescribe the limits within which it may be taken; and the corporation shall file a location of the land taken. The statute indicates a more exclusive occupation of the land taken for materials or for station purposes than of the five rods in width on which the road is laid out. The latter gives directly only the right of way over the land; the right to exclude the owner from the land; to use the land for constructing and maintaining the road-bed; to erect upon it shops and buildings used in the business of a common carrier of persons and goods which are incidental to the right of way. The former—the taking of land for materials and for station purposes—directly contemplates the exclusive occupation and appropriation of the land as shown by the manner of the taking and the nature of the use for which it is taken; it is to be purchased or otherwise taken. If

not purchased, it cannot be taken until the county commissioners have prescribed its limits; and when taken it is taxable to the corporation; and the uses for which it is expressly taken require a possession as exclusive and practically as absolute as belongs to a seizin in fee. It may be assumed that the fee in land thus taken remains in the owner from whom it was taken, and that the corporation, by ceasing to use it for the purposes for which it was taken, and appropriating it to uses not included in its franchise, may become seized in fee, and thus disseize the owner, as was decided in regard to land over which a railroad was laid out in Proprietors of Locks, etc., *v.* Nashua, etc., R. Co., *ubi supra.*

In that case the court says: "The occupation of the buildings upon the demanded premises for the general purposes of trade and mechanical or manufacturing business by lessees having no other connection with the operations or interests of the corporation than as its tenants paying rent; and the conversion of those buildings, by the corporation, from their original design into private stores or shops for the purpose of so changing their use, placed them beyond the scope of the corporate purposes and functions, "and involved an assumption of ownership, and made the corporation tenant of the freehold by disseizin."

No occupation of land taken for depot or station purposes, which is not inconsistent with its use for such purposes, can be the evidence of a claim to the fee; and any occupation of it which is concurrent and consistent with and does not exclude its occupation for station purposes must be presumed to be under that right. The manner in which it shall be used for the designated purposes is in the discretion of the corporation and is no concern of the land-owner. Even if the corporation exceeds its franchise in the manner of such occupancy it does not thereby disseize the owner of the fee.

WHAT AMOUNTS TO CLAIM TO FEE OF LAND.

If a railroad corporation fits up its station-house with conveniences for furnishing lodging and food necessary for the comfort of its passengers, it does not claim the fee of the land by allowing others than passengers to use them; it is not a claim of the fee in the land that it does not distinguish between the public and its passengers in the use of the refreshment table, news-stand or telegraph office kept there. The building is none the less a station-house; and the fitting it for use and providing conveniences for passengers and the public alike is an incident of its use for the business of the corporation and a mode of inviting passengers to its road; and in doing it the corporation asserts no right except to maintain a station-house and what it deems incidental to that. It may exceed its corporate rights in the use of its station-house, but it does not thereby claim the fee in the land on which it stands. When the tenant came into possession of the franchise, the road was located and the station grounds of two acres taken at the terminus of the

road. What the prospective business of the road was does not appear; but it does not appear that its present dependence for business was upon the State prison. Whatever passenger travel there was to be for a time must be drawn by that; and the amount of it might depend largely upon whether it was attracted or repelled by the conveniences furnished to travellers by the corporation, for there were none furnished except by it; and the prospective business of the road and the increase of population and business about it might depend upon the conveniences furnished at the station to travellers and sojourners. The whole demanded premises were occupied as the station; and furnishing food, lodging, horse-keeping and horse-hire, and allowing buildings upon it to be used for a boarding-house and stable, and some of the land to be cultivated, all for the convenience of its passengers and others in order to increase the business of the road, were incident to its business as a passenger carrier, and consistent with its occupation for the purposes for which it was taken and with a claim to occupy for those purposes.

Another way of stating the question is, Would the tenant acquire the fee by twenty years' continued occupation? It is actually using the premises as its station grounds, and has its tracks and its engine and passenger-house upon them. If, after twenty years of such occupation as has been shown, it should wholly abandon the use for railroad purposes, and then should claim the fee by disseizin, the obvious answer would be that it occupied them under the taking for depot and station purposes, and not as owner in fee. It seems clear that the demandant has not the right of possession of the premises. The tenant is in possession in the exercise of a public franchise, with which the demandant has no right to interfere; and it is difficult to see how there can be a disseizin of the demandant while such occupation continues.

TENANT DOES NOT ACQUIRE FEE BY TWENTY YEARS' OCCUPATION.

In Proprietors of Locks, etc., *v.* Nashua, etc., R. Co., *ubi supra*, there had been an abandonment of the use of the land under the franchise; not a technical abandonment, because, as was said, a public franchise cannot be abandoned; but an entire disuse of it and an inconsistent use which would have been an abandonment of a private right, and which gave to the demandant a right of action in trespass, and therefore a right of at least temporary possession until the land should be used for the purposes of the franchise. In this case there has been no nonuser, but a continued occupation of the land for the purposes of the franchise, which is inconsistent with a claim of the fee. The same occupation cannot be both under the franchise and in fee. If it is not under the franchise, but by disseizin of the fee, it must give to the demandant the right of possession. Being in the rightful possession and the actual use of the land for the pur-

LAND OCCUPIED FOR PURPOSE OF FRANCHISE.

poses for which it was taken, and having the absolute right to determine the manner of occupation for such purposes, its occupation must be presumed to be in the exercise of that right. It is not until it substitutes another use for that given by its franchise, so its possession of the land is wrongful, that its occupation can be referred to the claim of the freehold.

Judgment for the tenant.

Extent of Company's Freedom to Use Land Taken for Railway Purposes. —As a rule a railway company acquires only an easement, a mere right of way. But "not, however, the right of way simply as the phrase is described in the old books of common law, written before railways had an existence, but as defined and regulated by statute. It is that right of way peculiar to a railroad. It contemplates all that is necessary and proper for the construction and maintenance of a railroad over the premises. It is the right (within the limits of the quantity allowed by statute to be taken) to all freedom in locating, and conveniently using the road and its appurtenances . . . as also all the attendant rights necessary to the operating of a railroad." Rorer on Railroads, p. 415. See Henry *v.* Dubuque, etc., R. Co., 2 Iowa, 1, 288, 301, 302; Preston *et al. v.* Same, 11 Iowa, 15; Kellog *v.* Malin, 50 Mo. 496. But lands, or the right of way over lands taken for a particular use by the right of eminent domain may not be devoted to a different use, by the mere right of the original taking. Mifflin *v.* Harrisburg, etc., R. Co., 16 Penn. St. 182.

When applied to a use different from such original purpose, the owner, his heirs, or assigns, or whoever is vested with the right of reversion, may maintain an action for damages for the use and occupation thereof. Malone *v.* City of Toledo, 28 Ohio St. 643.

In Lauer's Appeal, 55 Penn. St. 16, it was *held* that a railroad company cannot erect buildings, etc., not necessarily connected with the use of their franchise within the limits of their right of way. (See numerous cases cited therein.)

A defendant railway company by authority of their charter took for their railway purposes a tract of land belonging to plaintiffs, including two lots, A and C. No question was made as to the regularity of their proceedings in the locating and taking. Across the tract of land thus taken they constructed and afterwards maintained their railroad; but no portion of their roadbed was ever built, or of their tracks ever laid, in either of the lots in question A and C. They built upon the land taken a freight-house, which they placed partly on lot A; and they continued to use the building as a freight-house for eight years, when, having established a freight depot elsewhere, they ceased to use it in that manner. Five years afterwards they leased the building to a firm of produce dealers as a warehouse for that business at a rental of $400 per annum. Six years after this the plaintiffs' agent sent a letter to the company calling attention to the premises as occupied by the firm of produce dealers, asserting that such use was for a purpose to which the plaintiffs had a right to object, but adding that "they have, however, no desire to interfere with the present use if their rights can be protected, and they can receive a fair share of the income." The company contended that they derived advantages in their freighting business from the carriage of merchandise for the tenants, and the receipt and delivery of it at that building instead of at the regular station-house, and that the building remained adapted to the purposes for which it was erected, the corporation having no intention to permanently abandon the use of the premises for the railroads, and refused to pay to plaintiffs any part of the income of the premises.

Whereupon plaintiffs took action. It was *held* that the owner of the fee was entitled to maintain a writ of entry to establish his right therein and to recover damages or mesne profits for the unauthorized use of the land. Proprietors of Locks and Canals *v.* Nashua & Lowell R. Co., 104 Mass. 9.

In New York, accommodations for cattle and live stock are within the purposes for which railroads are constructed; and the lands necessary therefor may be taken by proceedings under the right of eminent domain. N. Y. Central, etc., R. Co. *v.* Gaslight Co., 5 Hun, N. Y. 201; Same *v.* Same, 63 N. Y. 326.

A railway company has the right to take land for a station and approaches thereto where the statute gives power to take land for "railway and works." Cother *v.* Midland R. Co., 2 Phillips Eng. Ch. 469.

Whether workshops for repairing and safely keeping the cars and locomotives for a railroad are necessary appendages to a railroad, and whether land sought to be condemned for a site for such workshop is really needed for that purpose are questions on which issues may be joined, to be decided at the trial. Southern Pacific R. Co. *v.* Raymond, 53 Cal. 223.

1 Rorer on Railroads, 414, says: "In some cases the entire fee of the land, or whatever estate the owner has, is vested in the company. Levering *v.* The Phil., etc., R. Co., 8 Watts and Serg't, 459; Chicago, etc., R. Co. *v.* Patchin, 16 Ill. 198." See also Burnett *v.* Nashville, etc., R. Co., 4 Sneed, Tenn. 528.

Ross

v.

Pennsylvania R. Co.

(*Advance Case, Pennsylvania. February* 1, 1886.)

A railroad company taking land by virtue of its right of eminent domain does not acquire the fee, but only an easement, and cannot permanently use it for a different purpose from that for which it was taken.

A reasonable time, to be determined by all attending circumstances, must, however, be allowed; and, pending appeal from condemnation proceedings, the railroad may rent the premises, and the owner of the fee will not be entitled to mesne profits.

Error to Common Pleas No. 4, Philadelphia county.

Ejectment by Ann Ross against the Pennsylvania R., and John Blair and George Ernig, tenants in possession. In 1880, plaintiff was the owner of the property in question, and in January, 1881, it was condemned by the railroad company under a petition which recited that they "desired to enter upon, take, and occupy the same for the purpose of constructing thereon an extension or branch of their railroad." The petition was approved, security given and approved, and possession surrendered by plaintiff in 1881, but the plaintiff's petition for jury to assess damages was not filed until 1883. A jury was appointed, who assessed damages, and their re-

port was confirmed; the court refusing, however, to allow interest on the award. Plaintiff appealed to Supreme Court, where proceedings were affirmed, and in May, 1884, received the amount awarded by the jury, and four days afterwards commenced this action on the ground that the company had not applied the property to the public uses for which it was taken, and for which alone they were empowered to take it, and that she was therefore entitled to recover premises subject to the easement acquired by the railroad. On the trial plaintiff's title was admitted, and notice having been given that mesne profits would be claimed, plaintiff offered to prove the rental value of property for time it was occupied for private use. The court excluded the evidence, and entered a nonsuit, which they afterwards took off; holding that the title of the railread company was inchoate until the final determination of the question of the value of the easement acquired, and held that, although they had obtained possession for public purposes, they could devote it to private purposes until a reasonable time after such determination, and that the time in the present case was not such reasonable time, and hence that the plaintiff, though the owner of the fee, was not entitled to recover the rental value of her property, although the railroad had received rent from it. Plaintiff took this writ, assigning for error the rejection of the testimony (as above), the entry of judgment of nonsuit, and refusal to set it aside.

Angelo T. Freedley and *Wm. Henry Rawle* for plaintiff in error.

Wayne Mac Veagh for defendant in error.

Per CURIAM.—It is true in this case the company did not acquire the land of the plaintiff in fee. It cannot permanently use it for a purpose different from that for which it was taken. A reasonable time, measured by all the attending circumstances, must be allowed to plan and perfect the arrangement for its proper use. A few days only had elapsed after this court decided what sum was justly due to the plaintiff, and her receipt of the money, before she brought this action of ejectment. The learned judge correctly held, under all the facts of the case, that the plaintiff could not recover.

Judgment affirmed.

Right of Company to Use of Land while an Appeal is Pending from Damages Assessed.—In the case of such an appeal the question is only: What is the value of the land taken? It does not bring in question the right of the company to the land appropriated. Burns v. Milwaukee, etc., R. Co., 9 Wis. 450; Stringham v. Oshkosh, etc., R. Co., 33 Wis. 471; Rippe v. Chicago, etc., R. Co., 23 Minn. 18.

The right to the land can only be tested by some direct proceeding. Stringham v. Railway Co., *supra*.

In Peterson v. Ferreby, 30 Iowa, 327, it was held that pending an appeal against the assessment of damages or compensation for condemned land the company were entitled to use the land.

In Levering v. Philadelphia, etc., R. Co., 8 Watts & Sergeant (Penn.), 459,

it was held that during the pendency of an appeal the company have a right to enter upon and use the land in the mean while and until the final result, but that unless they pay the amount found by the verdict and judgment the owner may recover the land in ejectment.

The legislature of Kansas, in 1870, enacted a statute providing that during an appeal against an award a railway company before taking possession must give a bond conditioned for the payment of all damages which should finally be recovered.

In Central Branch, etc., R. Co. *v.* Atchison, etc., R. Co., 28 Kans. 453, 1 Am. & Eng. R. R. Cas. 528, it was held that such statute was valid; that the occupation by the railroad company was provisional only.

Where land has been taken and a question is pending in a court as to the amount of compensation to which the land-owner is entitled, he will be protected in his constitutional right to possession of his property until his compensation be ascertained and paid or tendered to him. Mettler *v.* Easton & Amboy R. Co., 25 N. J. Eq. 218.

Terre Haute and Logansport R. Co.

v.

Crawford *et al.*

(100 *Indiana Reports*, 550.)

Where a railroad company appropriates land for its right of way, and the appraisers appointed to appraise the damages of the owner of the land, by reason of such appropriation, file their award of such damages, and the owner appeals from such award and excepts thereto upon the ground, among others, that the damages awarded were inadequate and unjust, for the reason that when the road was built, as proposed, upon the line appropriated, it would be necessary for the owner to fill his land, from two to five feet the entire length of the line appropriated, at large cost to him, and where, upon the trial of the issue thus tendered, evidence is admitted tending to prove the cost of making such fill, as an element of the owner's damages the railroad company cannot successfully complain of the admission of such evidence as error for the first time in the Supreme Court.

Where, upon the trial of the issue so tendered, evidence is offered and admitted, without objection or exception, tending to prove the cost to the owner of making such fill, an instruction, to the effect that in determining the amount of the owner's damages arising from the appropriation of his land for such right of way, it is proper for the jury to consider, among other things, the cost to him of making such necessary fill, is within the issues an applicable to the evidence in the cause, and, therefore, is not an available error.

The opinion of a non-expert witness, as to the cost or value of the work in making such fill, is competent evidence.

Where a railroad company appropriates land for its right of way, and the appraisers award damages to the owner of the land, from which award an appeal is taken to the proper court, the payment to the clerk of the damages awarded by the appraisers will operate only as a license to the railroad company to take possession of the land so appropriated; and the title to such

land will not vest in such railroad company until it has fully paid the damages finally assessed and adjudged in favor of such owner upon the final determination of such appeal by the proper court.

From the Cass Circuit Court.

D. B. McConnell, *R. Magee*, *S. T. McConnell*, *D. D. Dykeman*, *W. T. Wilson* and *G. C. Taber*, for appellant.

J. C. Nelson and *Q. A. Myers*, for appellees.

HOWK, J.—On the 23d day of October, 1882, the appellees were the owners of a certain tract or lot of land, containing nearly eight acres, lying within the corporate limits of the city of Logans-
FACTS. port, in Cass county. About the same date, the appellant deposited in the clerk's office of the court below a written instrument of appropriation, wherein it proposed to appropriate all the right, title and interest of the appellees in and to a strip of such land, fifty feet in width and extending through the land on a slight curve, the same width, four hundred and seventy-six and one half feet in length, for the purpose of constructing, maintaining and operating thereon the main track of an extension of appellant's railroad, etc. Appraisers were duly appointed to appraise the damages which the appellees would sustain by reason of such appropriation of their land, and such appraisers made due return to the clerk of the court below of their appraisement of appellees' damages, setting forth therein that the value of the land taken by the appellant was $200, and that the residue of the land would be damaged in the further sum of $200. Written exceptions to the appraisers' award of damages were filed both by the appellees and the appellant, and the issues of fact arising thereon were submitted to a jury for trial. A general verdict was returned for the appellees, assessing their damages, by reason of appellant's appropriation of their land, at the sum of $1,250; and with such verdict the jury also returned into court their special findings on particular questions of fact, submitted to them by the parties under the direction of the court. Over the appellant's motion for a new trial, the court rendered judgment against it, in appellees' favor, for the damages assessed and costs.

In this court, error is assigned by the appellant, which calls in question the decision of the trial court in overruling its motion for a new trial. In this motion, a large number of causes were assigned for such new trial, but of these we will consider such only as the appellant's counsel have discussed in their elaborate briefs of this case. In their statements of this cause, as preliminary to the first matter of which they complain, the appellant's counsel say: "It will be seen from an examination of the record, that the land in controversy lies in the northeastern portion of the city of Logansport, in a body of about eight acres; that appellant's right of way runs in an eastern direction, in a very slight curve, across

the south side of the tract, cutting off and separating from the main tract about one half of an acre; that when appellant's track is completed to grade, there will be an embankment from west to east, between appellees' land and the main portion of the city of Logansport, about three feet high at the west line of appellees' land, and rising by an ascending grade until it is nearly five feet high at the east line of their land, on the west line of Michigan avenue, thus leaving on the north side of the appellant's track about two acres, possibly three acres, of appellees' land that will be from three to five feet lower than the surface of appellant's track." Of the foregoing statement, the appellees' counsel say: "We believe that the appellant has, in its brief, stated correctly the character of the construction of the road through appellees' land; that the line of the road is on a curve, with a gradually ascending grade from west to east, making a fill the entire distance of four hundred and seventy-six and one half feet, averaging from three to six feet in height. None of the land was low, flat, swampy or wet, before the location and construction of the road. That part about which the witnesses testify it will be necessary to fill, was high and dry with gradual ascent to the north, only suitable and valuable for residence purposes. . . . The jury further find, as a fact, that after the location of the road, before these lands could be used for building purposes, it would be necessary to fill them up."

With these statements of the respective counsel before us, we come now to the consideration of the first alleged error of law occurring at the trial, of which complaint is made in argument by appellant's counsel, namely, that, "as a measure of the appellees' damages resulting to them by reason of the appellant's appropriation of their land, the court allowed appellees to offer and give testimony tending to prove the cost of filling up those low lands, over the appellant's objections." The point is made by appellees' counsel, and it seems to us to be sustained by the record, that the appellant saved no exceptions to the rulings of the court in the admission of this evidence; that the court was not requested by the appellant to instruct the jury to disregard such evidence, and that particular questions of fact, depending for their answer upon this evidence, without any objection thereto by the appellant, were submitted by the court to and answered by the jury. In this state of the record, the appellees' counsel earnestly insist that the appellant's objections to the admission of evidence tending to prove the cost of filling up the appellees' land, which was lower than the embankment of the railroad, as a measure or, rather as an element, of the appellees' damages resulting to them by reason of the appellant's appropriation of their land, come too late when

MEASURE OF DAMAGES—EVIDENCE—COST OF FILLING UP LAND.

made in this court for the first time, and cannot be considered as affording any sufficient ground for the reversal of the judgment.

In their first brief of this cause, the appellant's counsel next complain in argument of the following instruction to the jury, given at appellees' request: "The question submitted to you is one of damages, arising from the appropriation of the lands of certain persons named in the article of appropriation. In determining this question, it is proper for you to consider the value of the land actually taken, at the date of the appropriation; the effect upon and injury, if any, caused to the remainder of the land by the appropriation; the cost, if any, the construction will occasion to the owners in rendering it necessary for them to fill up lots or remaining portions of the land," etc. This is only a brief extract from a very long instruction, but it is all of it of which complaint is made here by the appellant's counsel. Did the court err in instructing the jury that it was proper for them to consider, in determining the amount of appellees' damages by reason of the appellant's appropriation, the cost, if any, the construction of the railroad would occasion to the appellees in rendering it necessary for them to fill up their lots or the remaining portions of their land?

INSTRUCTION TO JURY ON QUESTION OF DAMAGES.

In one of their exceptions to the award of damages by the appraisers, the appellees said that such award was inadequate and unjust, and not commensurate with the damages they would sustain on account of appellant's appropriation, for the reason that when the road was constructed on the line appropriated to the established grade, there would be a fill across their lots and land the entire length of the land appropriated, of from two to five feet, which fill would render the adjoining land and lots of much less value, because it would be necessary to fill them two to five feet before they could be used for any purpose, or be marketable at any price; that to make such fill would put the appellees to an additional cost of $1500, and in that amount would damage their property, etc.

This exception tendered one of the issues which were tried by the jury, and evidence was offered and admitted, without objection by the appellant so far as the record shows, tending to sustain the exception. Indeed, it seems to us from the record, that the cause was tried below upon the theory that the cost of filling appellees' land and lots, rendered necessary by the construction of appellant's railroad, was a proper matter to be considered by the jury in estimating the amount of appellees' damages caused by the appropriation. Without deciding whether or not this theory was correct, we are of opinion that the instruction complained of was within the issues and applicable to the evidence, in this cause, and that it affords no sufficient ground, therefore, for reversing the judgment below.

One Frederick Behrens, a witness for appellees, testified that he

lived in Logansport and was sexton of the cemetery; that he had some experience in hauling dirt and filling up lots in the city of Logansport, and had done "lots" of that kind of work and knew what it was worth; that he knew where the appellees' land lay, had worked there and had seen it before, for some years; that he knew where appellant's railroad ran through such land, had hauled gravel up there; and that he had examined the lay of appellees' lots north of the railroad. He was then asked by the appellees' counsel: "What was it worth to fill up those lots?" Appellant objected to the question, "for the reason that it is not a matter that an expert can be called upon to testify in relation to, and because it must be arrived by giving the number of yards of dirt necessary," etc. The court overruled the objection, the appellant excepted, and the witness answered: "It is worth from $800 to $1000." EVIDENCE AS TO COST OF FILLING UP LOTS.

This ruling of the court was assigned as cause for a new trial by appellant, and is complained of here as erroneous. Counsel say: "Appellant submits that it was not competent for the witness to state what it would cost to fill the three acres. That was one of the questions, if allowable in the case at all, which the jury were to decide. Had the witness stated facts upon which his conclusion rested, it would have been the exclusive province of the jury to determine the cost of the fill." In support of their argument, appellant's counsel cite the cases of the City of Logansport *v.* McMillen, 49 Ind. 493, and Ohio, etc., R. Co. *v.* Nickless, 71 Ind. 271, and they add: "Without further discussion of this question, appellant cites the recent case of Yost *v.* Conroy, 92 Ind. 464 (47 Am. R. 156), in which case the precise question is presented and decided." We are of opinion, however, that the question propounded and the answer of the witness thereto, in the case in hand, are not in conflict with the rules of evidence declared in either of the cases cited and relied upon by appellant's counsel. On the contrary, we think that the evidence complained of here was clearly competent under the rule of evidence recognized and acted upon by this court in Johnson *v.* Thompson, 72 Ind. 167 (37 Am. R. 152). This rule is thus stated in Greenleaf on Evidence, vol. 1 (13th Ed.), section 440, note: "Non-experts may give their opinions on questions of identity, resemblance, apparent condition of body or mind, intoxication, insanity, sickness, health, value, conduct, and bearing, whether friendly or hostile, and the like." The rule has been repeatedly recognized and followed in the more recent decisions of this court. Bowen *v.* Bowen, 74 Ind. 470; Smith *v.* Indianapolis, etc., R. Co., 80 Ind. 233; Ætna Life Ins. Co. *v.* Nexsen, 84 Ind. 347 (43 Am. R. 91); Yost *v.* Conroy, *supra*. In the case last cited, which is one of the cases cited by appellant, the doctrine is said to be elementary, that witnesses acquainted with values may express their opinions in relation to values. Under this rule, it was clearly competent for the witness, Behrens, to ex-

press his opinion as to what it would be worth to fill up appellees' lots. Of course, the appellant had the right, by cross-examination, to draw out the basis of the witness' opinion, and to show thereby if he could, that such opinion was of little or no value; but the opinion was none the less competent and admissible in evidence, for whatever it might be worth.

We cannot disturb the general verdict of the jury upon the ground of excessive damages. In answer to a particular question of fact, propounded by appellant and submitted by the court, the jury found upon evidence tending to sustain such finding, that the value of the entire tract of land owned by appellees, at the time of and immediately before appellant's appropriation, was $6500, and that the value of the balance of the land, after the appropriation was made, was $5250. The difference between these two sums is $1250, which, as we have seen, is the amount of the general verdict.

EXCESSIVE DAMAGES.

The last error of which complaint is made here by appellant's counsel, is the overruling of the motion to modify and correct the judgment below, and to strike therefrom the following words: "And that the title to such right of way shall vest in said railway company, when this judgment, interest and costs are paid and satisfied." There is no error, we think, in this decision of the court. The precise question arising on appellant's motion was presented to and decided by this court, adversely to the position and argument of appellant's counsel, in Lake Erie, etc., R. Co. *v.* Kinsey, 87 Ind. 514. In that case, as in the case at bar, the railroad company proceeded to condemn and appropriate a right of way for its road, under the provisions of section 3907, R. S. 1891, in force since May 6th, 1853, and, having paid to the clerk the damages awarded by the appraisers, took possession of such right of way. There, as here, also, the owner of the land filed exceptions to the award of damages and appealed to the circuit court, where, on trial had, the damages were largely increased, and judgment was rendered accordingly. Such judgment was not paid, and the owner brought an action against the railroad company to recover possession of the land appropriated for its right of way. Upon the foregoing facts, it was held by this court in the case last cited, that the owner was entitled to recover, and, further, that the payment to the clerk of the damages, awarded by the appraisers, did not vest the title to the land appropriated in the railroad company, but operated only to give it a license to take possession, subject to the result of future litigation, and determinable upon its failure to pay the compensation found just on final trial.

TITLE TO RIGHT OF WAY—WHEN VESTED—PAYMENT OF JUDGMENT AND COSTS.

We have now considered and passed upon all the questions discussed by appellant's counsel, in their briefs of this cause, and our conclusion is that no error is saved in or shown by the record, which authorizes or requires the reversal of the judgment.

The judgment is affirmed with costs.

GOLDEN BOULDER AND L. R. CO.

v.

HAGGART *et al.*

(*Supreme Court of Colorado. November* 12, 1886.)

The proceedings to condemn a right of way for a railroad the title of one named in the petition as respondent to the land sought to be taken is admitted unless it is expressly denied, and the averment by respondent of title to property not covered by the petition will entitle him to damages in respect thereto, if such averment is not denied.

Eight hundred dollars *held* not an excessive award against a railroad company for taking a strip of land, about 900 feet in length, across two patented mill-sites, and a right of way over a lode claim.

APPEAL from County Court, Clear Creek county.

Condemnation proceedings.

Teller & Orahood for appellant.

W. T. Hughes for appellees.

HELM, J.—Petitioner sought to condemn, for the use of its railway, a strip of land about 900 feet in length, across two patented mill sites; also the right of way over a certain lode claim. Its line touched the stream upon which the mill sites are located, and, according to the evidence, its embankment would materially increase the expense of constructing dams necessary to operate machinery thereon. In view of these facts, we are not prepared to say that $800 was an excessive award for the land actually taken, and the damages inflicted upon the remaining property. DAMAGES HELD NOT EXCESSIVE.

The foregoing conclusion disposes of one proposition argued by counsel for appellant, leaving but a single question to be considered, viz., did the court err in refusing to charge the jury that, unless they found the title to a certain tunnel in respondents, they should assess no damages for injuries thereto?

Respondents Teal and Foster were made parties on motion of petitioner. In their answer filed, they first disclaim any interest in the mill sites, and then admitted ownership of half the lode described by the petition. They also averred title to one half of a certain tunnel and other workings. From the pleadings and evidence we may justly infer that the tunnel and workings mentioned were simply improvements upon the lode location described. In such case, injuries to them might be regarded as injuries to the realty. The jury either took this view, or they awarded nothing on account of inter- TITLE TO TUNNEL—CONSIDERATION OF.

ference with the usefulness of the tunnel; for, while the verdict itemizes the damages, and separately specifies the respective amounts allowed, it contains no reference to the tunnel. If the jury allowed nothing for interference with work upon the claim by means of the tunnel, the error, if error there were, in refusing the instruction, was without prejudice, and appellant cannot complain. If, on the other hand, the jury considered the inconvenience and extra expense occasioned by the railroad embankment, in prosecuting development through the tunnel, whose estimating $100 as "damages resulting to the remainder of the lode claim," no error was committed; for the claim was described in the petition, and a right of way over the same was therein demanded.

We are of the opinion that when one files his petition naming a respondent, and seeking the condemnation of certain specified property, the petitioner thereby, in the absence of special averment to the contrary, admits such title in the respondent named as authorizes the assessment of full compensation for the taking of the premises described, or the injury thereto.

There is no doubt but that the question of ownership may become an issue in these proceedings. Such issue, however, must be property presented by the pleadings. Respondents' averment of title to the tunnel was not denied, and for this reason also, even were the tunnel regarded as property not covered by the petition, we should hold that the court did not err in refusing the instruction asked.

The judgment is affirmed.

COGSWELL

v.

NEW YORK, NEW HAVEN AND HARTFORD R. CO.

(*Advance Case, New York. October*, 5, 1886.)

An engine-house erected by a railroad company adjacent to plaintiff's dwelling-house, and so used as practically to deprive plaintiff of the use of the house as a residence, and by filling it with smoke and dust, and corrupting and tainting the air with offensive gases, makes life therein uncomfortable and unsafe, is a palpable nuisance, for which an action for damages will lie, and a court of equity will enjoin the same.

The statutory sanction which will justify an injury to private property must be express, or must be given by clear and unquestionable implication from the powers expressly conferred, so that it can fairly be said that the legislature contemplated the doing of the very act which occasioned the injury.

It cannot be presumed, from a general grant of authority, that the legislature intended to authorize acts to the injury of third persons, where no compensation is provided except upon condition of obtaining their consent. The construction applies with peculiar force to grants of corporate powers to private corporations, which are set up as a justification for acts to the detriment of private property.

Defendant in this case sought to justify its acts by virtue of the authority conferred upon it by Act of 1848, chap. 143, sec. 6. *Held*, that said authority, however broadly construed, did not sanction the acts complained of.

APPEAL from judgment of general term of the Superior Court of the city of New York, affirming a judgment of the special term dismissing the complaint upon the merits after a trial by the court without a jury.

Lewis Johnston for appellant.

H. H. Anderson for respondent.

ANDREWS, J.—We are relieved, by the findings of the trial judge, from any question as to the sufficiency of the evidence to establish that the engine-house, as used by the defendant, constitutes, under the general rule of law, a private nuisance to the property of the plaintiff. The compromise exacted by the necessities of the social state, and the fact that some inconvenience to others must of necessity often attend the ordinary use of property, without permitting which there could in many cases be no valuable use at all, have compelled the recognition in all systems of jurisprudence of the principle that each member of society must submit to annoyances consequent upon the ordinary and common use of property, provided such use is reasonable, both as respects the owner of the property and those immediately affected by the use, in view of time, place and other circumstances. It is in many cases difficult to draw the line and to determine whether a particular use is consistent with the duties and burdens arising from vicinage, or whether it inflicts any injury for which the law affords a remedy.

ENGINE-HOUSE AS PRIVATE NUISANCE TO PROPERTY.

There is, however, upon the evidence and findings in this case no room for doubt. The plaintiff, from 1870, has been the owner of a house on East Forty-sixth street, in the city of New York, used as a private residence, of the value at that time of at least the sum of $20,000. In 1872, the defendant, the New York & New Haven R. Co., purchased a lot adjacent to the lot of the plaintiff, extending from Forty-sixth to Forty-seventh street, and bounded on the west by Fourth avenue, and erected thereon an engine-house and coal-bins for the use of its road, and since the year 1872 has used the engine-house for the reception, sheltering, storing, cleaning, oiling, dumping, repairing, and firing its locomotives, and the coal-bins for coaling the same.

FACTS.

The engine-house was designed to accommodate eleven locomotives, and has eleven smoke-stacks, extending above the roof to

about the height of the third-story window of the plaintiff's house. The court found that the engine-house and coal-bins were so constructed and used by the defendant as necessarily to cause damage from the use thereof to the plaintiff's dwelling-house, and that the coal-bins were unprovided with sufficient covering to prevent the dust of the coal, from time to time stored therein and removed therefrom by defendant, from passing into and upon the plaintiff's land and dwelling-house.

The court further found that there is now, and at all times since 1872 has been, emitted from the engine-house and smoke-stacks, and from the defendant's engines in the engine-house, hurtful and offensive gases, smoke, soot and cinders, and coal-dust from the coal-bins, and that the same pour down upon, and are borne by the winds into and upon the plaintiff's dwelling-house and premises, filling the house with smoke, soot and cinders, injuring the furniture and clothing therein, rendering the air offensive and unwholesome, and the house uncomfortable and unhealthy as a habitation, and greatly reducing the rental value of the premises. The evidence fully justified the findings of the court. It was shown that the house was rendered untenantable, and could not be rented, although before the erection of the engine-house it had been rented for $2500 a year; that the plaintiff's son became ill in consequence of the unwholesome atmosphere, and that she was compelled to remove him from the house on that account, and that the value of the house had diminished one half, a depreciation caused in great part at least by the maintenance and use of the engine-house. In short, the engine-house as used practically deprived the plaintiff of the use of the house as a residence. The defendant did not physically eject her therefrom, but by filling it with smoke and dust, and by corrupting and tainting the atmosphere with offensive gases, made life therein uncomfortable and unsafe.

It is scarcely necessary to cite authorities to show that the engine-house as used was, within every definition, a nuisance, for which, as between individuals, an action would lie for damages, and for which a court of equity would afford a remedy by injunction. See St. Helen's Smelting Co. *v.* Tipping, 11 H. L. Cas. 642; Fish *v.* Dodge, 4 Den. 311; Campbell *v.* Seaman, 63 N. Y. 568.

ENGINE-HOUSE CONSTITUTE NUISANCE—WHETHER ACTION LIES FOR DAMAGES.

In Radcliffe *v.* Mayor, etc., 4 N. Y. 198, a case which is often cited to sustain the doctrine that consequential injuries to private property, from the prosecution of public improvements, do not give a right of action, Judge Bronson, referring to the general rule that a man may do what he will with his own property, said: "He may not, however, under color of enjoying his own, set up a nuisance which deprives another of the enjoyment of his property."

The correctness of the findings of fact, made by the court, is not

questioned by the defendant. The court placed its judgment, denying relief, upon the ground that defendant was a railroad corporation, authorized by law to acquire real estate for an engine-house; that an engine-house at the point where this engine-house was erected was necessary for the operation of its road, and that, in the construction and use of the engine-house and coal-bins, it had exercised all practicable care. The findings of law from these premises was that "whatever damages has resulted to the plaintiff, or her property, by reason of defendant's use and occupation of its house and coal-bins, is *damnum absque injuria.*

It is manifest that if this judgment can stand a most serious injury is inflicted by the defendant upon the plaintiff, for which she has no redress. Her premises are subjected to a burden in the nature of a servitude in favor of the defendant, which seriously impairs the value and enjoyment of her property. The principle upon which the court below proceeded was that what the legislature has authorized the defendant to do can neither be a public nor private wrong; in other words, the legislature has authorized the maintenance of this nuisance by the defendant, and the plaintiff must bear the consequence. The court below, in denying any relief to the plaintiff, of course assumed that the legislative authority, and the act of the defendant thereunder, resulting in flooding the plaintiff's premises with soot, smoke and noxious gases, was not a taking of the plaintiff's property within the Constitution.

LEGISLATIVE AUTHORITY—WHETHER DEFENDANT'S ACTS AMOUNTED TO TAKING PROPERTY.

We place our judgment in this case on the ground that the legislature has not authorized the wrong of which the plaintiff complains, and it is, therefore, unnecessary to determine whether the legislature could have authorized it consistently with the principles of the Constitution for the security of private rights, without providing for compensation. The legislative authority under which the defendant seeks to justify the maintenance of the nuisance in question is found in section 6, chapter 143 of the Laws of 1848, entitled "An act to amend an act entitled 'An act relating to the New York & Harlem R. Co.,' passed May 7, 1840." That section authorizes the defendant, the New York & New Haven R. Co., to enter upon and run its cars by the power or force of steam, animals or any mechanical power, over the road of the New York & Harlem R. Co., from the point of junction of the two roads in Westchester county, to and into the city of New York "upon such terms and to such point as has been or may hereafter be agreed upon by and between said companies." The defendant is a Connecticut corporation. Its road extends from New Haven, in that State, to a point on the Harlem railroad in Westchester county in this State. It constructed the part of its road in this State, from the State line to its junction with the Harlem Railroad at Willams Bridge, under the authority of the act of the legislature, chapter 195 of the Laws of 1846. When the Act of 1848

was passed, the two companies had entered into an agreement for the use by the defendant, for its cars, of the tracks of the Harlem Railroad from Williams Bridge to the city of New York, in which among other things the New York and Harlem R. Co. agree to furnish defendant corporation room for their engine-house at Thirty-third and Forty-second streets, not to exceed one half of the real estate of the former company at that place, for which the defendant was to pay as provided in the agreement. It is claimed that the legislature has authorized the erection and use of the defendant's structure on Forty-sixth street. The only express authority conferred by the legislature is found in the sixth section of the Act of 1848, above referred to. The authority conferred by that section, on the face of it, is simply an authority to the defendant to run their cars on the Harlem Railroad, to the city of New York, upon such terms as may be agreed upon between the two companies. The most obvious purpose of this section was to confer corporate capacity upon the defendant to do that which, without legislative authority, it could not do, viz., operate its road beyond the terminus fixed in the Act of 1846, from Williams Bridge to the city of New York. But even this authority was not absolute. It could be exercised only in case, and upon the terms of an agreement between the two companies, for the use by the defendant of the tracks of the Harlem Railroad. Upon this slender authority is based the claim of the defendant that the legislature has authorized the injury in question. The argument in brief is: The legislature has authorized the defendant to run its trains into the city of New York, over the Harlem road; it cannot do this without an engine-house conveniently located; the power to acquire lands for and to construct an engine-house is, therefore, incidental to the power expressly given; the company has exercised due care in its location, construction and maintenance; the annoyances suffered by the plaintiff are a necessary consequence of its use, and, therefore, the principle applies "that an act done under lawful authority, if done in a proper manner, can never subject the party to an action, whatever consequences may follow." We shall pass without examination the question whether the authority given to the defendant to purchase land for an engine-house is implied in the power conferred in the sixth section of the Act of 1848, to enter into an agreement with the Harlem Railroad for the use of the tracks of that road, and to run its cars thereon, to the city of New York.

For the purpose of this case we shall assume that the general power conferred included the latter power as incident. It is no doubt a settled principle of the law that many things may be done by the owner of land, causing consequential damages to his neighbor, for which the law affords no remedy. The cases embraced within this rule are those either where what was done was in the lawful and reasonable use by an owner of land of his own property,

CONSEQUENTIAL DAMAGES FROM USE OF LAND—REMEDY AFFORDED.

or where the damages suffered, although by possibility attributable to the wrongful act of another, were too remote therefrom to justify the court in treating the one as the sequence of the other. The case before us belongs to neither of these categories. The defendant's engine-house, as maintained, was a palpable nuisance, causing special injury to the plaintiff, for which by the general rule of the common law, she has a right of action. The defendant, however, does not rely for its justification upon the ordinary rule governing the rights of adjoining proprietors, but, as we have said, rests upon the claim that the legislature has authorized the acts of which the plaintiff complains, and has, therefore, made that lawful which otherwise might be unlawful, and has taken away any remedy which the plaintiff otherwise might have had.

AUTHORITY OF LEGISLATURE TO LEGALIZE ACTS INJURIOUS TO PROPERTY.

It is undoubtedly true that there are cases in which the legislature, in the public interest, may authorize and legalize the doing of acts resulting in consequential injury to private property, without providing compensation, and as to which the legislative sanction may be pleaded in bar of any claim for indemnity. Indeed such is the transcendent power of Parliament that it is the settled doctrine of the English law that no court can treat that as a public or private wrong which Parliament has authorized, and, consequently, as stated by Blackburn, J., in Hammersmith, etc., Railway Co. *v.* Brand, 4 H. L. Cas. (Eng. & I. App.) 171, "the person who has sustained a loss by the doing of that act is without remedy, unless in so far as the legislature has thought it proper to provide for compensation."

The legislative power in this country is subject to restrictions, but, nevertheless, private property is frequently subjected to injury from the execution of public powers conferred by statute, for which there is no redress. The case of consequential injuries resulting from street improvements authorized by the legislature is a familiar example.

SAME—AUTHORITIES REVIEWED.

In Radcliffe *v.* Mayor, etc., *supra*, which is a leading case, the corporation of Brooklyn laid out, opened and graded a street, under an authority contained in the charter, and the court held that in the absence of negligence the city was not liable for consequential damages suffered by the plaintiff from the sliding downof his land, caused by the cutting down of the street, and thereby removing the lateral support. The court in its opinion declared that it had never been considered that consequential damages to private property, resulting from the opening and improving streets or highways, or other work of a public nature, could be recovered. The case has been frequently followed, and its authority completely established by repeated decisions in this State. It is an application of a principle well settled that private interests

must yield to the public welfare, but the case carries to the utmost limit the right of the legislature, for public reasons, to interfere with private property to the injury of the owner, without making compensation.

The case of Bellinger *v.* New York Central R. Co., 23 N. Y. 42, is another case frequently cited to support the claim that a use of property authorized by the legislature cannot, in the absence of negligence, constitute an actionable injury. It was an action brought for the flooding of the plaintiff's land on the Mohawk flats, caused, as was charged, by the turning of the water of the West Canada creek out of its natural course by an embankment constructed for the use of the railroad over the lowlands west of the creek. The Utica & Schenectady R. Co.—to whose rights and obligations the defendant succeeded—was a corporation created by chapter 294 of the Laws of 1833, with power to construct a railroad between Schenectady and Utica, "on the north side of the Mohawk river, as far as the village of Herkimer." The charter authorized the directors to locate the line where it would be most advantageous for the road, and file a certificate of location, and the charter declared that the line so located should be deemed the line on which the road should be built. The company located its line on the creek at the point in question. It constructed a bridge across the creek, five hundred feet long, and also left a water-way eighty-two feet wide in the embankment, for the passage of water in time of flood. The freshet which flooded the plaintiff's land occurred at the time of breaking up of the ice of the creek in the spring. It was shown that ice and water flowed and were forced upon the plaintiff's premises at the breaking up of the creek in 1799, and again in 1813, and on three occasions after the road was built, between 1835 and 1866. There was some evidence tending to show that the flooding in question was occasioned by the embankment and the want of sufficient apertures for the passage of the water. The plaintiff recovered a verdict, and the judgment, was reversed by this court on the ground of the rejection of evidence offered by the defendant bearing upon the point whether the embankment and bridge were carefully and skilfully constructed. It was claimed by the counsel for the plaintiff that this was an immaterial issue. The court, in its opinion, conceded that according to the general rule of law, if the structure of the defendant caused the injury, it would be liable irrespective of negligence, but held that, as the company was authorized by the statute to construct its road across the creek at the point where it was located, it was liable only for such consequences as were attributable to a failure to exercise due care and skill in executing the statute authority.

The case of Bellinger *v.* New York Central R. Co. is perhaps the strongest case to be found in our reports of the application of the doctrine that a statutory authority justifies acts which other-

wise would give a right of action. But it will be noticed that it was a case where the line of the road was fixed by the charter. It was necessary, in constructing the road on that line, to cross the creek on a bridge, and the lowlands upon an embankment. The flooding of the plaintiff's premises was an unusual occurrence, and the evidence was very slight that it was caused by the structures of the defendant. It was under these circumstances that the court reached its conclusion that the damages suffered by the plaintiff were not recoverable in the absence of negligence on the part of the defendant in the construction of the road.

But the statutory sanction which will justify an injury to private property must be express, or must be given by clear and unquestionable implication from the powers expressly conferred, so that it can fairly be said that the legislature contemplated the doing of the very act which occasioned the injury. This is but an application of the reasonable rule that statutes in derogation of private rights, or which may result in imposing burdens upon private property, must be strictly construed. For it cannot be presumed from a general grant of authority that the legislature intended to authorize acts to the injury of third persons, where no compensation is provided, except upon condition of obtaining their consent. This construction of statutory powers applies with peculiar force to grants of corporate powers to private corporations, which are set up as a justification for acts to the detriment of private property.

In the case of Gardner *v.* Trustees of the Village of Newburgh, 2 Johns. ch. 162, the chancellor granted an injunction to prevent the village of Newburgh from diverting the water of a stream, under an act of the legislature which authorized in general terms the taking of the water for the use of the village, and which provided for compensation to the owner of land on which the spring or source of supply was situated, but made no provision for compensation to the owner of land below, through which the stream passed. When this case arose, there was no provision in the constitution of the State prohibiting the taking private property for public use without compensation. But the chancellor held that making of compensation was an indispensable attendant of the exercise of the public right, and what is more material to our present purpose, he declared that the legislature could not have intended, by the general powers conferred, to violate or interfere with private rights.

The same principle is stated with unusual force of language by Chief-Justice Marshall in United States *v.* Fisher, 2 Cranch, 390. He says: "Where rights are infringed, where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with

irresistible clearness to induce a court of justice to suppose a design to effect such objects."

What may be a sufficient statutory sanction for acts which injuriously affect general public rights or individual property is illustrated by cases which hold that an authority to construct a railroad and use locomotives thereon takes away any remedy by indictment or private action for such consequences as necessarily result from the use of locomotives, such as noise, vibration, etc., although no compensation is provided. Rex *v.* Pease, 4 Barn. & Adol. 30; Vaughan *v.* Taff Vale Co., 5 Hurlst. & Norm. 679; Hammersmith R. Co. *v.* Brand, *supra*.

SAME—ENGLISH RULE.

There are two recent English cases which apply with great distinctness the principle that a statutory sanction cannot be pleaded in justification of acts which, by the general rules of law, constitute a nuisance to private property, unless they are expressly authorized by the statute under which the justification is made, or by the plainest or most necessary implication from the powers expressly conferred. These are the cases of Hill *v.* The Managers of the Metropolitan Asylum District, 4 Q. B. Div. 433; s. c. on appeal, 6 App. Cas. 193, and Truman *v.* London & Brighton R. Co., 25 Ch. Div. 423. The case of Hill *v.* Managers of the Metropolitan Asylum District was an action for damages and for an injunction to restrain the use of a small-pox hospital, established by the defendants under direction of the Poor Law board, under authority of the Metropolitan Poor Act of 1867. The act of Parliament authorized the erection of the asylums for sick, infirm and insane paupers in the Metropolitan Asylum District in London, to be designated by the Poor Law board, and authorized the purchase, leasing or fitting up of buildings for the purpose; and the act referred to small-pox patients as among the class of persons to be provided for. The managers, under the direction of the Poor Law board, erected a hospital for small-pox patients near premises of the plaintiff. The jury found that the hospital was a nuisance, occasioning damage to the plaintiff. The court, on the hearing, granted an injunction, and the case was appealed to the House of Lords, where it received great consideration, and the judgment was affirmed. The defendants justified under the act of Parliament. The judges pronouncing opinions conceded that, according to the settled doctrine of the English law, if Parliament had expressly authorized the construction of the hospital upon the very site where it was located, its use in the manner and for the purpose contemplated could not be restrained by injunction, except in so far as it was negligent, although such use should constitute a nuisance at common law, and no compensation would be due in respect of injury to private rights unless provided for in the act. But it was held that the statutory sanction sufficient to justify the creation of a nuisance must be express; that the particular land or site for the

hospital must have been defined in the act, or, as held by one of the judges, it must appear that the act, while defining certain general limits, could not be complied with at all without creating a nuisance, and its performance was made imperative. In the House of Lords opinions were pronounced by Lord Chancellor Selborne, Lord Blackburn and Lord Watson, all concurring in substantially the same view. Lord Watson said: "If the order of the legislature can be implemented without nuisance, they cannot, in my opinion, plead the protection of the statute; and, on the other hand, it is insufficient for their protection that what is contemplated by the statute cannot be done without nuisance, unless they are also able to show that the legislature has directed it to be done. Where the terms of the statute are not imperative, but permissive, when it is left to the discretion of the persons empowered to determine whether the general powers committed to them shall be put into execution or not, I think the fair inference is that the legislature intended that discretion to be exercised in strict conformity with private rights, and did not intend to confer license to commit nuisance in any place which might be selected for that purpose."

The case of Truman *v.* London & Brighton R. Co. was also an action for damages and for an injunction to restrain a nuisance created by the maintenance, by the defendant, of cattle-yards at its station at East Croyden. The defendant was authorized by its charter to purchase lands in such places as it should deem eligible for the purpose of providing station-yards for loading and unloading cattle, etc. It purchased lands for that purpose adjoining its East Croyden station, but near the dwelling of the plaintiff. The court found that the company acted *bona fide* in selecting the site, and conducted the business with all practicable care, but also found that it created a nuisance to the plaintiff, and granted the injunction. The case arose after the decision in Hill *v.* Managers of the Metropolitan Asylum District, and was decided upon the principles there laid down. It is manifest that these cases, if well decided, completely answer the defence in the present case. See, also, Queen *v.* Bradford Nav. Co., 6 Best & Smith, 631; Attorney-General *v.* Colney Hatch Lunatic Asylum, L. R., 4 Ch. App. 147; Hooker *v.* N. H. & N. R. Co., 14 Conn. 146; s. c., 15 Id. 312.

The authority conferred upon the defendant by the sixth section of the Act of 1848, to run its trains over the Harlem Railroad, was not, however broadly construed, a legislative sanction to commit a nuisance upon private property. The authority expressly given was not absolute, but conditional upon obtaining the consent of the Harlem Railroad. It could not be known by the legislature that the building of an engine-house would necessarily interfere with private rights. However necessary it may be for the defendant that its engine-house should be located where it is, this constitutes no justification for the injury

PLAINTIFF HELD ENTITLED TO DAMAGES.

suffered by the plaintiff, nor is it any answer to the action that it exercises all practicable care in its management. It may have the right, which it claims, to acquire lands by purchase for the accommodation of its business, but it must secure such a location as will enable it to conduct its operations without violating the just rights of others. Public policy, indeed, requires that in adjusting the mutual relations between railroad companies and individuals, courts should not stand upon the assertion of extreme rights on either side, but in this case the facts leave no room for doubt that the plaintiff has suffered a substantial and unauthorized injury.

The case of Baltimore & Potomac R. Co. *v.* Fifth Baptist Church, 108 U. S. 317, fully supports the conclusion we have reached in the case, and the able opinion of Mr. Justice Field in that case vindicates the right of private property to protection against substantial invasions under color of corporate franchises.

The judgment should be reversed and a new trial ordered.

All concur.

Judgment reversed.

Noise, Smoke, etc., as Elements of Damage.—See note to Chicago & E. R. Co. *v.* Blake, 24 Am. & Eng. R. R. Cas. 293; Republican Valley R. Co. *v.* Linn, 14 Ib. 198; Rowen *v.* Atlantic, etc., R. Co., 14 Ib. 332.

WABASH, ST. LOUIS, AND PACIFIC R. CO.

v.

McDOUGAL *et al.*

(*Advance Case, Illinois. October* 6, 1886.)

The cash market value of land taken for a railroad is the proper measure of damages for the land so taken; and as to lands damaged, the measure of damages is the difference between the value of the land before, and its value after, the construction of the road.

The claim for damages and that for the value of the land taken may be distinct. Damages for injury to land belong to the owner at the time of the injury, and do not pass to a subsequent vendee, who is presumed to have paid only the market value of the land at the time he bought it.

The owner of land cannot recover for damages which accrued to it before he purchased it.

For any increase of damage which results to the land from any alteration in the embankment of the railroad after such purchase, the vendee is entitled to recover, and may do this in a proceeding to condemn the land bought by the railroad company, without being put to an independent action.

ERROR to the Circuit Court of Menard county. Reversed.

Proceeding to condemn right of way for a railroad. Cross petition to recover damages. The jury assessed compensation;

judgment was entered on the verdict, and the plaintiffs brought a writ of error.

The plaintiffs in error instituted this proceeding in the Circuit Court of Menard county to condemn a right of way 100 feet wide for their railroad over and across lands of McDougal and Hamilton described as part of N. W. quarter of section 11, T. 19 N. R. 8 W. and part of N. frl. half of section 10, same township. The petition represents that the plaintiffs were the owners of and operating a railroad between the city of Springfield and Havana that was formerly owned by the Springfield & Northwestern R. Co.; that the embankment of the railroad was constructed and placed on the lands above described; and alleges that McDougal and Hamilton are the owners of the land, and that Fisk is interested as mortgagee.

The defendants in error filed their cross petition, alleging that McDougal and Hamilton were also the owners of the southwest quarter of said section 10, containing 132 acres; the northeast quarter of the southeast quarter of said section 10, containing 40 acres; the west half of the southeast quarter of said section 10, containing 80 acres.

The 40-acre tract lies one fourth of a mile, the 80-acre tract one half of a mile, and the 132-acre tract three fourths of a mile from the railroad. It is alleged in the cross petition that the three tracts therein described and the two tracts described in plaintiff's petition comprise one compact body of land and constitute a single farm of 548.51 acres; that the strip of land sought to be condemned contains 10 acres and runs diagonally through the farm in a southeasterly direction, dividing and separating about 160 acres from the rest of the farm, thereby greatly injuring all portions of the farm not sought to be taken; that by the construction of the railroad and the embankments thereof, the natural and accustomed flow of the overflowed waters of Sangamon river and Lake run have been obstructed in their natural course, and thereby a portion of said land has been submerged and damaged; and that, in divers other ways set out, damage is caused to the land from such overflowed water by reason of the railroad and such embankments; and praying that these damages may be assessed and paid to defendants. Previous to the commencement of the trial the parties entered into a stipulation in writing, as follows:

"It is stipulated in the above entitled cause that the railway over the tracts of land sought to be condemned in this proceeding was constructed by the Springfield & Northwestern R. Co.; that at the time the land described in plaintiffs' petition was appropriated by said Springfield & Northwestern R. Co. the title to said land was in John P. Bennett; that subsequent to the building of said road, to wit, in 1872, McDougal and Hamilton, defendants herein, acquired a fee-simple title to said land, and are now, and ever

since have been, the owners of said land in fee simple; and also at said time acquired title to all the land described in the cross petition herein, and still have title thereto.

The evidence shows that the land sought to be taken is about 7 acres in quantity, and of the value of $10 to $20 an acre; that the whole 548.51 acres is subject to annual overflow, and was so subject to overflow before the railroad was constructed. When the defendants offered evidence to prove the damages claimed in their cross petition, the plaintiffs objected thereto, upon the ground that defendants did not own the land at the time the railroad was constructed, and that the damages sought to be proved, if any, accrued to Bennett, who owned the land at the time the road was constructed, and not to defendants; but the court overruled the objection and permitted defendants to prove the difference in the value of the land before and since the construction of the road, and also damages sustained by them by reason of a washout in the railroad embankment, and other damages sustained by the land by the construction of the railroad upon it.

It appears from the testimony of Hamilton, one of the owners of the land, that after he and McDougal got it, they agreed with Thompson, Grigg & Co., who at that time operated the railroad, to give the right of way across the land on condition that they be permitted to join their levee to the embankment of the railroad, and that the latter be kept intact without any opening; that in pursuance of this agreement McDougal and Hamilton built a levee around that portion of the land lying below the railroad, and attached the end of it to the embankment, thereby, with the levee and railroad embankment, forming a bank of earth around 388½ acres of the land and protecting it from overflow; but McDougal and Hamilton did not convey the right of way. Also that the embankment of the railroad was maintained without any openings until 1875, when a portion of it was washed away; and that McDougal and Hamilton—under an agreement with Col. Williams, who then had the road—filled up the break, and continued to use the embankment as a part of their levee until 1882, two years after the Wabash Co. purchased the road, when another break was made in the embankment by the high water, destroying the usefulness of the levee, when McDougal and Hamilton proposed to the Wabash Co. to carry out with it the agreement made with Thompson, Grigg & Co. provided the former would repair the break in the embankment and maintain the latter; but the Wabash Co., instead of filling the break with earth, put in filling and a bridge, leaving an opening in the embankment for the water to pass through.

There was evidence that a proper construction and maintenance of the road-bed required the break in the embankment to be filled; that if the embankment was properly constructed and maintained, the railroad would not be a damage to the 548.51 acres.

The court refused to instruct the jury, at the instance of plaintiffs in error, that McDougal and Hamilton, not being the owners of the land described in the cross petition at the time of the construction of the railroad, were not entitled to have the damages therein claimed assessed in this proceeding.

The court also so refused to instruct the jury that the only damages to the lands described in the cross petition, which the owners were entitled to recover, were such as resulted from the proper construction and maintenance of the railroad; and if by the proper construction and maintenance of the road the owners would sustain no damage, then they could not recover damages claimed in their cross petition in this proceeding, although the railroad company, since the construction of the road, negligently and wrongfully suffered and permitted the embankment to be washed away and to remain out of repair, whereby the land was depreciated in value.

The jury assessed the just compensation to be paid by the plaintiffs to the defendants at the sum of $4,134.50. Judgment was entered upon the verdict after overruling a motion for a new trial, and the plaintiffs bring this writ of error.

George B. Burnett for plaintiffs in error.

N. W. Branson and *Edward Laning* for defendants in error.

SHELDON, J.—As the lands described in the petition and cross petition were owned by one Bennett at the time the railroad in question was constructed, and the defendants in error purchased them from Bennett subsequent to the building of the road, it is insisted that whatever damage was done to the lands described in the cross petition by reason of grading the road-bed and constructing the railroad was to Bennett, and that in the absence of all evidence on that subject it may be presumed the railroad company adjusted the damages with him; that if Bennett did not insist upon the payment of these damages, defendants in error cannot. In Dupuis *v.* Chicago & N. W. R. Co., 23 Am. & Eng. R. R. Cas. 93, an instruction which declared the law to be that the cash market value of the land taken is the proper measure of damages for land taken by a railroad, and as to lands damaged, the measure of damages is the difference between the value of the land before and after the construction of the road—was held to be correct. And in Page *v.* Chicago, M. & St. P. R. Co., 70 Ill. 328, such measure of damages was expressed to be the difference between what the whole land would have sold for unaffected by the railroad, and what it would have sold for as affected by it; and the court there says the damages must be for an actual diminution of the market value of the land. This being the measure of damages to land not taken, it would seem to follow that the damages thereto became fixed and determined when the railroad was constructed.

MEASURE OF DAMAGES.

The railroad was then upon the land—a permanent structure; its damages to the land for all time were then assessable, and would have been assessed in a condemnation proceeding.

The damages were then done to the land and sustained in the depreciated value of it by reason of the railroad, and the injury suffered by Bennett, the then owner of the lands.

When the defendants came to buy the land of Bennett, they bought with the disadvantage of the railroad upon it, and with the deduction, as must be supposed, of the amount of that disadvantage. They paid the market value of the land, it must be presumed, as it then was with the railroad upon it, and not its market value without the railroad upon it.

DAMAGES TO LAND BELONG TO OWNER—SUBSEQUENT VENDEE.

In addition to such presumption there is the testimony of Hamilton himself that, at the time they purchased, the land would have been worth, without the railroad upon it, $20 an acre, or at least $15; that they purchased the 548.51 acres for $6500, so that, if it was worth at the time they purchased $20 an acre without the railroad upon it, they paid $4470 less than that value; or, if the land was worth $15 an acre without the railroad upon it, there was paid $1,727.50 less than such value. Defendants have been compensated for the damage of the railroad in the reduced price which they paid for the land because of the railroad being upon it; and to allow their claim for damages in the proceeding would be giving them pay for the damages a second time, and compensation for an injury which was done to another, viz., Bennett, the former owner of the land, and who sustained the damage from it in the depreciated price which he received for the land because of the railroad.

Toledo, W. & W. R. Co. *v.* Morgan, 72 Ill. 155, supports this view. The court there says: "It is charged the company wrongfully constructed its railroad on the lands of appellee across the natural drains and outlets, so as to obstruct the same, whereby large bodies of water accumulated and rendered the lands unfit for cultivation. There is a total want of evidence to support a recovery on either of those counts. The appellee did not own the lands when the company graded and constructed its road at that point. Whatever damage was done by reason of the grading of the road-bed was to his grantor. In the absence of all evidence on that subject, it may be presumed the company adjusted the damages with him. If the former owner did not complain, certainly his grantee cannot. He purchased the land with the incumbrance of the railroad embankment upon it. It was open and visible, and he could see exactly how the farm was affected by the construction of the railroad."

Mr. Mills, in his work on the law of eminent domain, § 66, says: "The claim for damages and of title to land may be distinct. Damages for taking and injuring land belong to the owner at the time

of the injury, and do not pass to a subsequent vendee. The owner alone can take advantage of a claim for damages; and if he does not claim, his subsequent vendee cannot." Chicago & E. I. R. Co. *v.* Loeb, 5 West. Rep. 887; Kutz *v.* McCune, 22 Wis. 628; Memmert *v.* McKeen, 3 Cent. Rep. 383, a recent decision of the Supreme Court of Pennsylvania.

It is answered to the Morgan case that the rule there announced does not apply here, because that was an action on the case. The principle of that decision was that the owner of land cannot recover for damages which accrued to it before he purchased the property, and would seem to apply to any case where such damages were sought to be recovered, whether in a proceeding to condemn or any other form of action.

The case of Chicago & I. R. Co. *v.* Hopkins, 99 Ill. 316, is relied upon by defendants in support of their claim. In that case land was advertised for sale under a decree of court against the heirs of one Ward, and pending the advertisement of sale under the decree, and a few days before the sale took place, the railroad company entered upon the land and constructed its road over it. Hopkins purchased the land at the sale, and in the subsequent condemnation proceeding he was allowed compensation for the taking of the land by the railroad company. The court there says: "The title of the Ward heirs was unincumbered by any right of way in the company, and their title to the whole land, including the so-called right of way, passed by the judicial sale and deed to Hopkins." The title which Hopkins acquired at the sale related back, and vested in him as of the date of the decree under which he purchased, so that it was his land upon which the railroad company entered and constructed its railroad; and of course it was he who was entitled to the compensation therefor. We do not consider that that case at all overrules or conflicts with the decision in the Morgan case, or is at variance with our present decision.

ALTERATION OF EMBANKMENT—ADDITIONAL DAMAGES.

But what has been said is with reference to the railroad as it was then constructed, at the time defendants purchased the land. At that time the embankment of the railroad was solid and continuous over the land or a portion of it, but since then, and after the plaintiffs came into possession of the road, there occurred a break in the embankment which, instead of filling up, plaintiffs left as a permanent opening for the passage of water, and put in a bridge. The evidence tends to show that this opening and bridge in the embankment have been adopted by plaintiffs as a permanent feature in the construction and maintenance of their road, and that it is a cause of additional damage to the land.

For any increase of damage which results to the land from this alteration in the embankment, we think the defendants are entitled to recover; and that they may do so in this proceeding, and not

be put to another action for such damage, as contended for by defendant's counsel, on the ground that a proper construction and maintenance of the embankment required the break in question to be filled up.

There was not a mere negligent maintenance of the embankment, but, as the evidence tended to show, an alteration in the method of the permanent construction of the embankment by the adoption of this opening in it; and no matter whether that would be a proper construction of the embankment or not, if that was the plan of construction which the railroad company had adopted, the assessment of damages in a condemnation proceeding should be upon the basis of a road thus constructed. We think it may be treated here as if the application were to have the damages assessed because of the alteration in the embankment of this opening in it.

It follows that there was error in the court below in not restricting the inquiry and assessment of damages to the particular damages which resulted from the alteration in the construction of the railroad embankment by the adoption and maintenance of this opening in it.

The judgment is reversed, and the cause remanded.

Owner at Time Land is Taken can alone Recover Damages.—See Dixon *v.* B. & P. R. Co., 8 Am. & Eng. R. R. Cas. 201.

CUSHING *et al.*

v.

NANTASKET BEACH R. CO.

(*Advance Case, Massachusetts. November* 24, 1886.)

At the trial of a petition to assess damages for land taken for railroad purposes, it was attempted to introduce in evidence a printed document of the United States Senate, containing a report of one of the corps of United States engineers who made the survey of the railroad, for the purpose of showing that the building of the road was a benefit to the land of the petitioners, which should be taken into consideration in estimating the damages. *Held*, that such document is inadmissible.

At the trial of a petition to assess damages for land taken by a railroad company, a release executed to one who owned only a part of the land which is the subject of the petition is inadmissible against the petitioners, who do not claim under such release.

THIS was a petition for a jury in the Superior Court to assess damages for taking of the petitioner's land in Hull by the Nantasket Beach Railroad Company. At the trial in the Superior Court

before Mason, J., the verdict was for the petitioners, and the respondent alleged exceptions. The facts appear in the opinion.

R. M. Morse, Jr., and *Arthur Lord* for respondent.

D. C. Linscott for petitioner.

FIELD, J.—The respondent has argued the exceptions to the exclusion of the printed document entitled "48th Congress: 1st Session; Senate Ex. Doc. No. 74;" and the exception to the exclusion of the release of a part of the land which was tendered at the trial. The other exceptions were waived.

The Secretary of War, on January 24, 1884, transmitted to the Senate of the United States a letter from the chief of engineers submitting copies of reports made by Maj. Raymond, of the corps of engineers, and this letter, with the accompanying papers, when received by the Senate, was referred to the Committee on Commerce, and ordered to be printed. This printed document was offered in evidence by the respondent for the purpose of showing, from the report of Maj. Raymond, that the road-bed of the company protected the remaining land from being washed away by the sea, and that a special benefit was thus received by the petitioners from the location of the railroad, which should be considered in estimating the damages.

ADMISSION OF U. S. DOCUMENTS IN EVIDENCE.

The contents of papers in any of the executive departments of the United States are usually proved by a copy authenticated under the seal of the department. Rev. St. U. S. c. 17, § 882. We are not required to determine whether the printed document offered in this case would not be admissible in evidence, if a copy thus authenticated would be (see Whiton *v.* Albany & N. Ins. Co. 109 Mass. 24), because we think that the reports themselves are inadmissible for the purpose of proving, as between these parties, the facts stated in the reports.

The acts of Maj. Raymond and Assistant-Engineer Bothfield, in surveying the headland in the town of Hull, cannot be called acts of State, nor are the facts stated in the reports public facts, in the sense that they are facts which the United States have, under the authority of law, undertaken to ascertain and make public for the benefit of all persons who may be interested to know them; but they are facts which have been ascertained in the course of preliminary surveys made for the purpose of determining what action, if any, the national government may thereafter take for the purpose of protecting Boston harbor. The engineers who made the surveys can be called as witnesses in the same manner as other persons who have knowledge of the facts. There is no necessity for the admission of unsworn written statements, and the facts do not bring the case within any known exception to the rule that evidence "must be given on oath by persons speaking to matters within their own

knowledge, and liable to be tested by cross-examination." Sturla *v.* Freccia, 5 App. Cas. 623; S. C., 12 Ch. Div. 411.

The deed of release was rightly excluded. It recited that it was "in consideration of one dollar and the settlement of claims for land damage to the estate of the heirs of Samuel T. Cushing, in Hull, Massachusetts, the receipt whereof is hereby acknowledged," etc. If this release had been made to the petitioners, the acceptance of it would have been an admission by them that the claim for land damages had been settled. The release is, however, to the "heirs of Samuel T. Cushing, and their heirs and assigns," without otherwise naming any persons as releasees. The petitioners are Benjamin Cushing, William L. Cushing, Mary J. Cushing, and Abby C. Cushing, as she is executrix of the estate of Samuel T. Cushing; and they allege in their petition that said Benjamin, Samuel, William, and Mary Jane were seized in fee, as tenants in common, of the land when the respondent took a strip of it for the location of its railroad; that the land was devised to them by the will of Mary Cushing; and that, by the will of Samuel, who died after the location of the road, "all his interest in said land, and damages suffered by him, were given to said Abby C. Cushing." The petitioners, therefore, do not appear to be the "heirs of Samuel T. Cushing." It is not necessary to consider whether it is shown that Arthur W. Moore, as "assignee and trustee in possession," had any authority to execute the release, or whether a railroad company may not abandon its location, or a part of it, without the consent of the landowner, so that the land shall be thereafter discharged, in whole or in part, from the easement which the railroad company acquired by its location. There is no evidence of any abandonment, except the tender of this deed of release, which the petitioners were not required to accept for the reasons which have been given.

Exceptions overruled.

LAKE ERIE AND WESTERN R. CO.

v.

GRIFFIN *et al.*

(*Advance Case, Indiana. September* 23, 1886.)

A new railroad corporation succeeded to the property, rights, and franchises of an older company. It entered upon land appropriated by its predecessor, and continuously used the same for railroad purposes to the exclusion of the land-owner. The value of the land had been determined in the original proceedings by the judgment of a court of competent jurisdiction. *Held*, that the new company is deemed to have adopted the original

appropriation, and is, in equity, liable therefor, and it cannot escape such liability by afterwards abandoning the land.

In suits in equity as well as in actions at law the Supreme Court will not reverse on the mere weight of evidence.

APPEAL from Carroll Circuit Court.

Chase & Chase for appellant.

G. O. & A. O. Behm, *John R. Coffroth*, and *S. A. Huff* for appellees.

HOWK, C. J.—This case is now here for the second time. The opinion and decision of this court on the former appeal are reported under the title of Lake Erie, etc., R. Co. *v.* Griffin, 92 Ind. 487; s. c., 17 Am. & Eng. R. R. Cas. 235. On the former appeal, we held that the second paragraph of appellee's complaint stated an equitable cause of action against the appellant, and we reversed the judgment theretofore rendered herein, because the court had erred, in our opinion, in submitting the cause to a jury for trial. In our former opinion we gave a full summary of the facts stated in the second paragraph of appellees' complaint, to which we refer without repeating it here, as we do not find that any change was made in any of the pleadings after the cause was remanded. The cause was tried by the court, and the court made a special finding of the facts, and thereon stated its conclusions of law. Over the exceptions of both parties to its conclusions of law, and over appellant's motions for a *venire de novo*, and for a new trial, the court rendered a decree in favor of appellees, and against the appellant, in accordance with such conclusions of law. FORMER OPINION.

The first error complained of here on behalf of the appellant is the overruling of its exceptions to the court's conclusions of law upon its special finding of facts.

The facts found by the court were, in substance, as follows:

The Lake Erie & Western R. Co., and the La Fayette, Muncie & Bloomington R. Co., defendants hereto, are respectively railroad corporations of the State of Indiana, organized under and pursuant to the laws of such State. The plaintiffs herein were, on the 24th day of October, 1875, and for many years prior thereto, the owners in fee simple of 37 feet off of the west end of lot No. 1, in O. L. Clark's addition to the city of La Fayette, which west end of such lot abuts on an alley 12 feet wide. At and prior to the time aforesaid, the La Fayette, Muncie & Bloomington R. Co. owned and operated a line of railroad along and contiguous to the above-described real estate, and, on the day last named, appropriated such real estate for the use of its track, and necessary side tracks, water stations, and depot; and on said day it filed its act of appropriation in the clerk's office of Tippecanoe county, and appraisers were appointed by the Tippecanoe Circuit Court, who, on December 14, 1875, made and filed, in such FACTS.

clerk's office, their report, awarding the plaintiffs the sum of $2400 as their damages by reason of such act of appropriation. The plaintiffs excepted to such report, and appealed therefrom to the Tippecanoe Circuit Court, and the venue of the case was changed to the Carroll Circuit Court, where a trial was had, and a judgment was rendered, on May 16, 1877, in favor of the plaintiffs, for $5008.66 damages, and $80.60 costs, which judgment remained unpaid.

Prior to the filing of such act of appropriation, the La Fayette, Muncie & Bloomington R. Co. had executed two mortgages upon its railroad property—one for $666,000 and the other for $1,750,000. These mortgages covered all the railroad property of such company, of every kind and description, and the first one covered all its property, in the city of La Fayette, contiguous to plaintiffs' lot. The one for $666,000 extended from the Illinois State line to the Toledo, Wabash & Western R., in La Fayette, covering what was called the "Western Division;" and the other mortgage covered the property from La Fayette to Muncie, being what was called the "Eastern Division."

On the first day of February, 1879, decrees foreclosing both of such mortgages were rendered by the United States Circuit Court for the District of Indiana, against the La Fayette, Muncie & Bloomington R. Co., under which a commissioner appointed for that purpose sold all the franchises, rights, property, and effects of such company to certain persons, as a bondholders' committee, for $1,413,000, leaving a large balance of such decrees unpaid. A deed was made to such purchasers on April 28, 1879, and they formed a new corporation called the Muncie & State Line Co., with a capital of $600,000, to whom they conveyed such railroad, with its rights and franchises, on the 29th of April, 1879. Afterwards, on July 24, 1879, the Muncie & State Line R. Co. consolidated with the La Fayette, Bloomington & Mississippi R. Co., under the name of the La Fayette, Bloomington & Muncie R. Co., which last-named company owned and operated a line of railroad from Bloomington, Illinois, to Muncie, Indiana, a distance of 200 miles. On the 19th of December, 1879, the last-named company consolidated with the Lake Erie & Western R. Co. of Ohio and Indiana, owning and operating a line of railroad from said Muncie to Fremont, Ohio, and since extended to Sandusky, Ohio; which last-mentioned consolidated company assumed the corporate name of the Lake Erie & Western R. Co., and is the appellant in this cause.

The defendant, the La Fayette, Muncie & Bloomington R. Co., after such condemnation of appellees' real estate, entered upon and occupied the same until the succession of appellant, the Lake Erie & Western R. Co., to the rights, property, and franchises of such first-named company through the sale, organization, and consolida-

tion hereinbefore mentioned; and this occupancy and possession were such, at the commencement of this suit, as to exclude the appellees from the use and enjoyment of the same. The exact date when such occupancy and possession by defendants began cannot be determined from the evidence. The La Fayette, Muncie & Bloomington R. Co. was, at the time of the rendition of such judgment against it, in favor of the appellees, insolvent, and had been since, and still was, insolvent.

On the 25th day of January, 1881, the appellees executed a mortgage to John R. Coffroth on the property condemned as aforesaid, to secure several promissory notes executed by them to Coffroth, amounting, in the aggregate, to the sum of $600, which mortgage was duly recorded in the recorder's office of Tippecanoe county, and became a valid lien upon the appellees' interests in such real estate. Such mortgage was due and unpaid. One of the plaintiffs, John Griffin, had died since the commencement of this suit, intestate, and his co-plaintiffs took, by inheritance, all his interest in such real estate, and in the judgment rendered in the condemnation proceedings.

Upon the foregoing facts the court stated the following conclusions of law:

"The Lake Erie & Western R. Co. has elected to adopt the original appropriation of the plaintiffs' said land, and, having adopted such appropriation, it is bound to make compensation to the plaintiffs for the same. (2) The said judgment in the Carroll Circuit Court for $5,008.66, and $80.60 costs, shall be taken as the value of the land so appropriated. (3) As the plaintiffs have, since said condemnation proceedings, executed the said mortgage upon said land, whereby they have not been in a condition to give the defendants, or either of them, an unincumbered title to such land, and could not, after the execution of such mortgage, legally demand the payment of said judgment, they should be denied interest upon the said sum of $5,089.26. (4) The defendant, the Lake Erie & Western R. Co., should pay the clerk of the Carroll Circuit Court, for the use of the plaintiffs, within 60 days from this date, the sum of $5,089.26, and out of such sum the clerk of this court shall pay and satisfy said mortgage, and the residue pay to the plaintiffs, or their attorneys. I further find that the defendants should pay and satisfy the costs of this suit.

[Signed] 'M. WINFIELD, Judge *pro tem.*"

In discussing the alleged error of the trial court in overruling appellant's exceptions to the court's conclusions of law, its counsel say: "The conclusions of law—(1) that the appellant is bound to make compensation to the appellees for their land; (2) that the judgment in their favor, against the L., M. & B. R. Co., the predecessor of the appellant, rendered May 16, 1877, shall be taken

as the value of the land; and (3) that the appellants should pay the principal of such judgment, to wit, $5,089.26, within sixty days—are erroneous."

It is claimed by appellant's counsel that "the finding of facts contain nothing showing that the appellant has ever used or occupied the appellees' land." This claim of counsel, we think, is not supported by, but is in direct conflict with, the special finding of facts. The court found specially, as we have seen, that the La Fayette, Muncie & Bloomington R. Co., after its appropriation of appellees' real estate, entered upon and occupied the same until the succession of appellant to its rights, property, and franchises, and that said occupancy and possession were such, at the commencement of this suit, as to exclude the appellees from the use and enjoyment of such real estate. It was further found that appellant succeeded to the rights, property, and franchises of said La Fayette, Muncie & Bloomington R. Co., on the 24th day of July, 1879, and thereafter owned and operated the line of railroad, along and contiguous to appellees' real estate, until the commencement of this suit, on the 19th day of May, 1882; and that, on the day last named, the occupancy and possession of such real estate "by defendants" (of whom appellant was one), were such as to exclude the appellees from the use and enjoyment thereof. In the second paragraph of their complaint the appellees averred that, upon its succession to the rights and franchises of the former corporation, the appellant entered upon, used, and occupied the premises condemned by its predecessor, and from thence until the commencement of this suit had continued to occupy and use such premises.

OCCUPATION OF LAND BY NEW COMPANY.

On the former appeal of this cause we held that, if this averment were true, it showed the appellant's election to adopt the original appropriation of appellees' premises, by its entry upon, use, and occupation of such premises for the purposes of its railroad. We there said: "In such case, the appellant's liability does not rest upon the judgment against the old corporation, but upon the principle that, having adopted and ratified the original appropriation, it is bound, in equity and good conscience, to make compensation; for the right of the appellees to compensation for their property is protected by the Constitution, and it will not do to say that their unsatisfied judgment against the old insolvent corporation affords them any just compensation. The maxim applies, *qui sentit commodum, sentire debet et onus.*"

SAME—ADOPTION OF ORIGINAL APPROPRIATION.

The facts specially found by the court fairly sustain, we think, the averments of the second paragraph of appellees' complaint; and therefore it must be held, in accordance with our opinion on the former appeal of this cause, that the court did not err in its

conclusion of law that appellant was bound to make compensation to the appellees for their real estate. By its exceptions to the conclusions of law, the appellant admitted, so far as the alleged error now under consideration is concerned, that the facts of the case were fully and correctly found by the court, and said that, upon those facts, the court had erred in its conclusions of law. This is settled by our decisions. Dodge *v.* Pope, 93 Ind. 480; Fairbanks *v.* Meyers, 98 Ind. 92; Helms *v.* Wayner, 102 Ind. 385.

The next error complained of on behalf of appellant is the overruling of its motion for a *venire de novo*. It is said that "the findings of facts are too vague and indefinite to justify any conclusion of law thereon against the appellant." We do not think so. Fairly construed, there is no uncertainty in the special finding of facts, and the facts found fully justify the court's conclusions of law. Under the alleged error of the court in overruling appellant's motion for a new trial, it is first insisted by its counsel that the damages assessed were excessive. Counsel say that there was no evidence of the appropriation of appellees' land by the appellant, and none of the value of such land, except the judgment rendered in May, 1877, in favor of appellees and against appellant's predecessor, the La Fayette, Muncie & Bloomington R. Co., in its proceedings to appropriate such land, to which proceedings and judgment appellant was not a party. It is not claimed that such judgment was not competent evidence on the trial of this cause, but it is claimed that it was not sufficient evidence, as against the appellant, of the value of appellees' land. It is said that appellant was not bound by such judgment, because it was a stranger to the record, and, in truth, was not organized or in being at the time the judgment was rendered. Ordinarily, no doubt, where a new railroad corporation is organized by the purchasers, at a judicial sale of the property, rights, and franchises of a previously existing railroad company, such new corporation does not become liable at law for the payment of the debts of its predecessor, unless it has assumed the payment of such debts. Section 3947, Rev. St. 1881. But in equity a different rule applies. Where, as in this case, upon a hearing had, a court of equity finds that the new railroad corporation, upon its succession to the property, rights, and franchises of its predecessor, had elected to adopt an appropriation of land made by the old company, by its entry upon such land, and by its continued use and occupation thereof, for the purposes of its railroad, to the entire exclusion of the owners of the land from the use and enjoyment thereof and that, in such appropriation proceedings, the value of such land so appropriated had been ascertained and determined by the judgment of a court of competent jurisdiction, it must be held, we think, that the new railroad corporation is

NEW COMPANY BOUND BY FORMER JUDGMENT UPON QUESTION OF VALUE.

bound and concluded by such judgment, upon the question of the value of the land so appropriated.

Appellant's right to use and occupy the appellees' land in the manner found by the court can only be derived through the appropriation proceedings instituted by its predecessor, the La Fayette, Muncie & Bloomington R. Co., and upon the fact found by the court, that appellant's occupancy and possession of appellees' land, at the commencement of this suit, were such as to exclude them from the use and enjoyment thereof, appellant was bound by the amount of the judgment in such appropriation proceedings, and the damages assessed herein were not excessive.

But it is earnestly insisted by appellant's counsel, and was assigned as cause for a new trial or hearing, that the findings of facts were not sustained by sufficient evidence. Counsel preface their argument upon this cause for a new trial with this inquiry: "What rule shall govern this court upon this proposition?" It was formerly held that, in a chancery cause, this court would not feel bound to respect the finding of the circuit court as it would the verdict of a jury or the finding of a court at law. "Having the evidence upon which the court acted," this court said, "we will weigh it and draw our own conclusions." Egbert *v.* Rush, 7 Ind. 706. At the time the case cited was decided below (in October, 1848) the evidence in chancery causes was submitted to the circuit court, upon final hearing, in the form of depositions of the witnesses taken out of court, and the circuit judge had no better opportunities or facilities for determining the credibility of the different witnesses than the judges of this court. Now, however, under our Civil Code, the evidence in all causes, whether at law or in equity, may be heard in open court, before the judge thereof. We know of no reason, therefore, for holding now that we are not bound to give the same respect to the finding of the trial court in a suit in equity that we have always given to the verdict of a jury, or the finding of a court in an action at law.

But this question is not now an open one in this court. In Miller *v.* Evansville Nat. Bank, 99 Ind. 272, in commenting upon the old rule of this court of weighing the evidence in chancery cases, it is said: "But practice demonstrated that this rule was of uncertain enforcement; and it is a well-known fact that the judge who saw the witnesses, heard them testify, and observed their demeanor on the witness stand, is much better qualified to weigh the evidence and come to a correct conclusion than this court could possibly be by only seeing the record of the evidence, which is seldom full, and frequently imperfect. From these considerations, the rule is now well established that, where the evidence fairly tends to sustain the verdict or finding, it will not be disturbed by this court, and this rule applies to causes in the nature of chancery suits the same as to actions at law."

WEIGHING EVIDENCE IN CHANCERY CASE.

So in State *v.* Wasson, 99 Ind. 261, the court said: "In chancery cases not triable by a jury the ancient practice of having the evidence taken before a master commissioner and brought before the court upon paper no longer prevails. The court trying the cause now hears the evidence from the mouths of living witnesses, and has every opportunity to test the weight of the evidence that judges trying causes as a jury in the old law court had, and his findings on questions of fact should no more be disturbed, on appeal, than the findings of fact made by a judge upon the trial of a case at law; and so this court has expressly decided." Pence *v.* Garrison, 93 Ind. 345.

We need not extend our opinion in the case under consideration by setting out or commenting upon the evidence appearing in the record. It will suffice for us to say, as we think we may safely do, that the evidence fairly tends to sustain the special findings of facts on every material point. In such a case, as we have often decided, we will not disturb the findings of the trial court, nor reverse its judgment and decree, upon what might seem to be the weight of the evidence. The reasons for this rule of decision have been given so often in our reported cases that we need not repeat them here. We adhere tenaciously to this rule in all cases, whether at law or in equity. Rudolph *v.* Lane, 57 Ind. 115; Fort Wayne, etc., R. Co. *v.* Husselman, 65 Ind. 73; Hayden *v.* Cretcher, 75 Ind. 108.

It is claimed by appellant's counsel that the trial court erred in admitting the evidence of certain witnesses to the effect that the appellees' lot was used by draymen, hackmen, express wagon and omnibus drivers, etc., when visiting trains and cars on appellant's railroad, etc. The evidence was competent, we think, as the use of such lot was the subject of inquiry. The value of the evidence depended upon how far it might be shown that such use of the lot was authorized by appellant, or necessary to the convenient dispatch of its daily traffic in freight and passengers. If no such showing was made, the evidence was immaterial and harmless; otherwise it was material. Even if the admission of such evidence were erroneous, it would not authorize a reversal of the judgment.

Finally, appellant's counsel insist that the court erred in overruling its motion for an alternative judgment herein. We are of opinion, however that the case made by the special finding of facts and the court's conclusions of law thereon was not a case wherein the appellant could, in equity and good conscience, be permitted to escape the payment of the value of appellees' lot, as found and adjudged by the court, by merely abandoning its use and occupancy of such lot for the purposes of its railroad, and by ceasing to exclude appellees from the use and enjoyment of such lot. City of La Fayette *v.* Shultz, 44 Ind. 97; Kimball *v.* City of Rockland, 71 Me. 137; *In re* Rhinebeck, etc., R. Co., 67 N. Y. 242.

From our examination of the record of this cause, we are impressed with the opinion that the merits of this cause have been fairly tried, and a just determination had, in the court below—fair and equitable to the parties on both sides, of which neither ought to complain. In such a case we cannot reverse the judgment.

The judgment is affirmed, with costs.

Sale of Railway and Franchise—Effect on Condemnation Proceedings.—Chicago, etc., R. Co. *v.* Lundstrom, 21 Am. & Eng. R. R. Cas. 528.

BALDWIN

v.

CHICAGO, MILWAUKEE AND ST. PAUL R. Co.

(*Advance Case, Minnesota. July* 7, 1886.)

Where the injury done to property by the construction of a railroad is at once fully completed and permanent, the entire damage is to be measured by the condition in which, when completed, it left the property. In such a case the proper measure of damages is the diminution in the value—not of the rental, but of the property.

APPEAL from an order of the first district, Goodhue county, denying a new trial.

W. C. Williston and *W. Colville* for appellant.

Wm. Gale for respondent.

GILFILLAN, C. J.—The plaintiff's house and lot are on one side of a street in the city of Red Wing, the track of defendant on the other side, the surface of the street sloping down from plaintiff's FACTS. to defendant's side. November 1, 1882, the defendant, as plaintiff alleges, wrongfully entered on, and made large excavations in, the street, between her lot and the track, causing the earth in the street to slide into such excavations, and destroying the carriage way in said street, by which she, prior thereto, had access to her premises, rendering them unsafe for occupation, and diminishing their rental value in the sum of $19 per month. Treating the wrong as a continuing trespass, she sues to recover this diminution in rental value, alleging no other damages. On the trial the plaintiff waived any claim to nominal damages, and, claiming to recover only the diminution in rental value, offered evidence to prove such diminution, which, on defendant's objection, was excluded; and no

damages being proved, the court directed a verdict for defendant. In both these rulings the court was right—in the latter, because no actual damages having been proved, the most that could in any event have been recovered was nominal damages, and, having waived her claim to those, the plaintiff could not recover them.

The plaintiff refers to Brakken *v.* Minneapolis & St. L. R. Co., 29 Minn. 41, 31 Minn. 45; s. c., 7 Am. & Eng. R. R. Cas. 593, and 32 Minn. 425; s. c., 20 Am. & Eng. R. R. Cas. 422, as establishing the proper rule of damages for the case. That was a case of what is called a "continuing wrong," in which, the injury being to real estate, the court held the rule of damages to be the diminution in the rental value. The railroad company having in that case the right to construct and maintain its railroad across the street, the wrong consisted in the improper construction of it, and the improper condition in which it left the street, the company continuing to maintain and keep the crossing in that improper condition. As the company had a right to, and might, at any time, remedy the wrong, the court held it improper to assess the damages on the assumption that it would be permanent, and that they ought to be measured as they might accrue, from time to time, until the company should remedy the wrong. In this case the wrong was at once fully completed, and the injury permanent. The *locus in quo* not being in possession of defendant, and, it not having the right to re-enter on the street to fill the excavation, damages are not to be assessed on the supposition that it may do so, but the entire damage to be measured by the condition in which, when completed, it left the property. The case comes within the decision in Karst *v.* St. Paul, S. & T. F. R. Co., 22 Minn. 118, in which the proper measure of damages, upon a wrong precisely like that in this case, was held to be the diminution in the value (not of the rental, but of the property).

RULE OF DAMAGES FOR PERMANENT INJURY.

The diminution in the rental value was not recoverable.

Order affirmed.

Decrease of Rental Value Evidence Competent to Show Damage to Property.—The decreased rental value of premises resulting from the proper and prudent operation of a road is a proper element of damages. Atlantic & Great Western R. Co. *v.* Robbins, 35 Ohio St. 531, Wood's R. Law 2, p. 906. See St. Louis, etc., R. Co. *v.* Capps, 67 Ill. 607; and Jubb *v.* Hull Dock Co., 9 Q. B. 443, where evidence as to the depreciation in rental of premises caused by public improvement *held* competent to show damages.

In re PETITION OF THE NEW YORK, LACKAWANNA AND WESTERN R. Co., etc.,

v.

BENNETT *et al.*

(*Advance Cases, New York. June* 1, 1886.)

The petitioner made a written contract with the appellants by which they agreed to purchase of Harriet A. Bennett certain elevator property, and commissioners were named therein to ascertain the compensation to be made by the company. It was agreed that they should be governed, in estimating said valuation, by the rules of law applicable to proceedings under the statute, with right of appeal. No compensation was to be allowed for damage to this or adjoining property, but they were to take into consideration "the capability of the premises for any use whatever." Appellant was to give a good title, etc. Under this agreement the commissioners were appointed at special term, and they appraised the property at $469,375; but, on appeal by the company from the order confirming the report, it was reversed, and the report of the commissioners was set aside; but the general term refused to appoint new commissioners, and the company appealed. The commissioners then had a rehearing, when the company made a motion at special term to vacate the order appointing them, on the ground of their misconduct, that they declined to be governed by the opinion of general term, which laid down the rule that the owners were entitled to the fair market value only, whereas they had admitted evidence of a valuation based upon the probable earnings of a new elevator, and projected connections with lines of transportation. *Held*, that the motion should not be granted; that the mere apprehension that the award will be excessive is not sufficient to justify their being prevented from making any.

2. That the provisions of the contract, so far as they bound the parties, were binding upon the court in carrying the contract into effect; that they required that the value of the real estate was to be ascertained by deciding upon its capabilities for any use whatever, and would fairly admit, as an element of value, evidence of the improvements of which it was capable, etc.; and that it was not misconduct in the commissioners to refuse to commit themselves, in advance, to a rule of decision which would exclude from their consideration matter to which it was expressly agreed they might have reference in reaching the result.

APPEAL from judgment general term Supreme Court, fifth department.

Geo. F. Comstock and *Norris Morey* for appellants.

Sherman S. Rogers for respondent.

RAPALLO, J.—This proceeding was instituted in pursuance of a written contract between the petitioner, the railway company, and the appellants, bearing date the 24th day of May, 1883. By that contract the railway company agreed to purchase of the ap-

pellant, Harriet A. Bennett, the property known as the "Union Elevator" at Buffalo, and with due diligence to take proceedings under the general railroad law for the purpose of ascertaining the value of the premises, and of the erections thereon, and the compensation to be paid therefor, and of obtaining the title in fee thereto. It was stipulated in the contract that Nelson K. Hopkins, Robert Dunbar, and Brigham Clark should be appointed commissioners in said proceedings, to ascertain the compensation which ought justly to be made by the company to the party or parties owning or interested in said property, and that the decision of the majority of them should be binding on both parties. It was further mutually agreed that the said commissioners should be governed, in estimating said valuation and compensation, by the rules of law applicable to proceedings under said statute ("excepting as they might be modified by this agreement"), and that all rights of appeal given by law should be reserved to either party. It was expressly agreed that in said proceedings no damage should be allowed because of injury to the Bennett elevator property, or any adjoining or adjacent premises, or any compensation allowed for anything except the actual value of the premises and property described in the agreement; that, in ascertaining the compensation to be allowed, the commissioners should "take into consideration the capability of the premises and property for any use whatever;" and that they should determine such compensation without delay, and upon their own knowledge and information, as well as upon such evidence as might be produced before them. The contract then went on to provide that the value finally arrived at in said proceeding should "be the fixed purchase price" to be paid by the railway company. It prescribed the time of payment and of delivery of possession, and also provided for the execution and delivery, by the appellant, Harriet A. Bennett, to the company, of a deed, with covenants of seizing and for quiet enjoyment, conveying a perfect title to the premises, except as to certain incumbrances for which allowance was to be made out of the purchase money. The contract contained further stipulations respecting mutual accommodations in the use of their docks by the Union elevator and Bennett elevator properties, and various other stipulations not affecting the main question presented upon this appeal, but to which it may be necessary incidentally to refer. Facts.

The proceeding for the appraisement of the property agreed to be sold was instituted by the railway company, as it had agreed, and in October, 1883, in that proceeding, thus instituted, an order was made by the Supreme Court, at special term in the fourth department, appointing the three gentlemen named in the contract commissioners to appraise the property. They made a report in January, 1884, fixing the compensation to be paid at the sum of $469,375, which report was confirmed at special term; but, on ap-

peal by the company to the general term, the order of confirmation was reversed, and the commissioners' report was set aside. On that appeal an effort was made by the railway company to have new commissioners appointed; but the Supreme Court refused that relief on the sole ground that it had not the power to grant it because the parties had, by their contract, agreed upon the commissioners. From that decision the railway company appealed to this court. No appeal was or could have been taken by the property owners from that part of the order which set aside the report of the commissioners, and consequently there has been no review here by that part of the decision of the general term. The ground on which that tribunal refused to appoint new commissioners was, however, reviewed here, and the decision was fully sustained. 98 N. Y. 447. The case then went back for a rehearing before the same commissioners, and, while that rehearing was pending before them, the railway company made a motion to the court at special term to vacate the order appointing the commissioners on the ground of alleged misconduct on their part. The allegations of misconduct contained in the moving papers were of two classes. One was that Mr. Robert Dunbar, one of the commissioners, had business relations with the claimants, Bennett and wife, which prevented him from being a disinterested appraiser. These charges were answered at the hearing at special term to the satisfaction of the presiding judge; and the counsel for the company does not now complain of the disposition made of that branch of the charges; but he confines himself on this appeal to the remaining branch, which is, in substance, that Commissioners Dunbar and Clark, on the second hearing, declined to be governed by the opinion of Bradley, J., who delivered the opinion of the general term on the appeal from the order confirming the report of the commissioners. This refusal was regarded by the court below as misconduct, which justified it in vacating the appointment of commissioners, and thus necessarily terminating the proceeding.

The precise manner in which the alleged misconduct is claimed to have been committed is set forth in the brief of the counsel for the railway company, and in the moving affidavits, which, for the purpose of this appeal, we must assume to be correct. Evidence had been admitted, on the first hearing before the commissioners, of the manner in which the property in question could be utilized by expending a large sum in increasing the capacity of the elevator, and estimating the income which it would be capable, with these improvements, of producing, and these estimates were mainly based upon evidence of the income earned by other elevators in Buffalo; and opinions as to the value of the property in question had been given, based, not upon the market prices of the property as it was at the date of the contract, but upon what it might be made to pay by improving it as an elevator; also of its capacity to

handle grain, if improved and operated in connection with the Bennett elevator, which was alongside. Evidence had been admitted, on that hearing, of estimates based upon projected connections with railroad companies, and facilities for transportation not under the control of the owners of the property in question, and other speculative matters.

In the opinion delivered by Bradley, J., and before referred to, the learned judge said that, when compared with other sales of property in the same locality, the value, as appraised by the commissioners, was exceptionally large; and he commented upon the evidence which had been given before the commissioners, and pointed out the contingencies to which some of the considerations on which the witnesses based their estimates were subject, and expressed the opinion that these estimates were matters of speculation, dependent on too many circumstances to be entitled to consideration as evidence of value. In these observations he referred, among other things, to the evidence as to the contemplated relation of the property to, and its operation in connection with, other property, and projects for connecting facilities with channels of transportation not within the control of the then owner of the property in question; and he said that, in view of all the testimony, it was difficult to escape the conclusion that the commission reached the result which they did by the application of erroneous principles to the appraisal of the value of the property in question, and that the amount of compensation awarded by their report was by that means increased considerably in excess of the fair market value of the property. In this opinion the learned judge laid down the rule that the owners were entitled to be allowed the fair market value of the property, and that that was the basis on which the estimate should be made and allowed by witnesses and the commission.

On the second hearing before the commissioners, evidence of David S. Bennett was received of a valuation based upon the probable earnings of a new elevator of a certain capacity, if erected upon the lot in question, based upon the past earnings of two elevators, which were named, and upon projected connections with lines of transportation. After the examination of this witness had been concluded, the counsel for the railway company moved to strike out his testimony so far as it assumed to give a value in dollars to the property in question. The grounds of the motion were specified; one of them being that the testimony on which the estimate was founded was inoperative and worthless under the decision of the general term. The motion to strike out the evidence was finally denied; Commissioner Hopkins being in favor of striking it out, Commissioners Clark and Dunbar of retaining it; Commissioner Dunbar saying that he was inclined to receive the evidence, and give it the weight which he thought proper. The question was raised at other stages in the case, and the sub-

stance of the struggle was, on the part of the railway company, to maintain that the decision of the general term was that the evidence and the valuation should be confined to the market value of the property as it was at the date of the contract, and that this decision was binding upon the commissioners, and should be followed by them; while, on the other hand, it was claimed that they were not so restricted, but were entitled to consider the rights of the parties under the contract, and make a just award between them; and reference was had to the opinion of this court on the first appeal.

The commissioners were then requested, by the counsel for the railway company, to rule on three propositions, viz.: First, there cannot be taken into consideration, in arriving at the value of the property, the probabilities of a connection with the railroad of the petitioner as one element affecting that value; second, that the opinion of the general term in the proceeding is controlling upon the commissioners as to the principles which should govern them in making their award; third, that the measure of the award is the fair market value of the property as it was at the date of the contract. The commissioners then adjourned without ruling on the propositions, and at their next meeting, having consulted among themselves, Commissioner Dunbar announced that he did not consider himself bound by the Supreme Court decision, but did consider himself bound and sworn to ascertain and determine the compensation which ought justly to be made by the company to the party or parties owning or interested in the property, and that he considered himself bound to do justice between the parties, and as much justice to the railroad company as to Mr. Bennett, as far as he knew. Commissioner Clark concurred with Commissioner Dunbar.

That the decision of Commissioner Dunbar, to the effect that he did not consider himself bound by the Supreme Court decision, had reference to that part of the opinion of Judge Bradley which held that the basis upon which the appraisement should be made was the market value of the property, is made very clear by the colloquy set forth in the moving affidavits, and by the request of the counsel for the railroad company to the commissioners to rule upon the point. Mr. Dunbar introduced the remark by saying, "Mr. Hopkins spoke to me this morning in respect to following the general term decision;" and Mr. Hopkins stated that the particular point to which he had called the attention of Mr. Dunbar was as to the manner of arriving at the value of the real estate.

It is needless to go over the various forms in which the question was raised by the counsel for the company, as it clearly appears that the substance of the whole controversy was whether the commissioners were bound to follow the rule laid down in the quoted portion of the opinion of Bradley, J., at general term on the case as there presented to him, and to exclude from their consideration, in making their ap-

RULE FOR APPRAISAL TO BE FOLLOWED BY COMMISSIONERS.

praisal, all evidence except such as bore upon the market value of the property as it was at the date of the contract; thus excluding estimates based upon the development of the property by means of improvements of which it was capable, and the probable increase which might be derived therefrom by means of such improvements; and the question for our determination is whether the commissioners, in declining to hold, in advance of any appraisal, that they were concluded on the point referred to, were guilty of misconduct which authorized the court below to vacate the order appointing them, and thus terminate the proceeding.

In respect to these matters the position of the commissioners was peculiar. They were not acting merely as officers of the court, owing their appointment solely to it, but they had been selected by the solemn contract of the parties; and that contract established the principles by which they should be governed in making the appraisement. After the decision of the general term on the first appeal had been pronounced, the case had come before this court, and it had adjudged that the provisions of the contract, so far as they bound the parties, were binding upon the court in carrying the contract into effect. Even if it should be conceded that the court had it originally in its power to decline to lend its aid to the carrying out of the contract, by refusing to appoint commissioners, and thus disabling the company from taking the first step which was essential to give vitality to the contract, it does not follow that after the court had entertained the proceeding, and set the machinery in motion by which rights had accrued to the parties, it could of its own volition, or in its mere discretion, terminate those proceedings, or require them to be conducted in a different manner or on different principles from those which had been agreed upon. On the former appeal to this court it was held that, notwithstanding the right of appeal was reserved to both parties, and notwithstanding that the statute authorized the court in ordinary cases, on the first appeal, not only to set aside the award of the commissioners, but to appoint new commissioners, yet that in this case it could not exercise the power to change the commissioners, because that would be a violation of one of the terms of the contract.

POSITION OF THE COMMISSIONERS.

The same principle applies in respect to the rules which should govern the commissioners in making their appraisement. The contract provided, in that respect, that they should be governed by the rules of law applicable to proceedings under the statute, except as they might be modified by the contract. One of these modifications was that no damages should be allowed because of injury to the adjacent premises. Could it be seriously argued that the court could at the instance of the property owners, having required the commissioners to allow such damages because the statute authorizes their allowance, or that

ELEMENTS TO BE CONSIDERED IN ESTIMATING DAMAGES.

it would be misconduct on their part, which would authorize their removal, to refuse to make such allowance if the court had, at some previous stage of the case, decided that it was proper? Assuming that the learned counsel for the company is right in claiming that the general rule in condemnation proceedings is, as he asked the commissioners to hold, "that the measure of the award is the fair market value of the property as it was at the date of the contract," and that this was a correct rendering of the opinion of the general term, we come back to the question whether the commissioners were bound so to decide in this case, in the face of the express stipulation of the contract, "that, in ascertaining and determining the compensation to be allowed, the said commissioners shall take into consideration the capability of the premises and property for any use whatsoever, and that they shall determine such compensation upon their own knowledge and information, as well as upon such evidence as may be produced before them." This language is much more comprehensive than "the market price" or "market value" of the premises at the date of the contract, and shows that the real value was to be ascertained, predicated, not merely upon the condition of the property as it was at the date of the contract, or the uses to which it was devoted at that time, but upon its capabilities for any use whatever; and would fairly admit, as an element of value, evidence of the improvements of which it was capable, and of the revenues which might with reasonable certainty be expected to be derived from the development of those capabilities. The peculiar nature of the property might be such that it had no fixed market value, and the parties therefore agreed that the commissioners, who were persons of experience, acquainted with the means of rendering property of that description available, might take into consideration what it was capable of yielding with reasonable and judicious development and management.

Of course, as just and reasonable men, it would not be expected that they would calculate as certainties profits which were speculative, and contingent or variable, but the language of the contract certainly implies that they were not to be confined, in their estimate, to the sum which it could be proved the property would bring if exposed for sale in the open market, or to a valuation based upon sales of other property in the vicinity. They were selected and agreed upon by the parties as competent judges of the real value of property of the description which was the subject of inquiry, and it is not to be assumed that they would omit to make due allowance for contingencies and uncertainties, and to properly weigh the evidence in connection with their own knowledge and information, to which, by the terms of the contract, they were expressly authorized to resort; and we are of opinion that, under the peculiar circumstances of this case, it could not be held to be misconduct in them to refuse to commit themselves, in advance, to a

rule of decision which would exclude from their consideration matters to which it was expressly agreed they might have reference in reaching a result.

There is nothing in the case to show that, in declining to decide as required by the counsel for the company, they intended to be disrespectful to the court, or arbitrarily to overrule the opinion referred to, or to be contumacious or perverse; but, on the contrary, it would rather seem that they intended conscientiously to perform their duty conformably to the contract under which they were appointed. The contract was one which secured advantages to both parties in return for rights which they surrendered. The railroad company evidently desired to acquire the property; and, if it had been compelled to resort to proceedings *in invitum*, it would have been open to the owners to resist them, and to contest the questions whether the property was required for railroad purposes, and whether the railroad company could in any event acquire more than a right of user. These points the owners surrendered by covenanting to give a deed in fee, conveying a perfect title, with covenants of seizin and quiet enjoyment, which no law could have compelled them to do. They also abandoned their claim to damages to adjacent property, which the law would have allowed, and they also agreed to withdraw the suits which they were then prosecuting against the company in relation to Darkbasin alley, and to assign to the company all their rights in that alley; also to convey to the company all their rights in lands in and adjoining the Evans ship canal, which the company were at the time seeking to obtain by proceedings under the railroad law. Various other arrangements for the mutual convenience of both parties were provided for in the contract, and the whole was based upon the assurance of a just compensation being made for the Musie elevator property, by having it appraised by three gentlemen of experience, agreed upon by the parties, who were to value the property in the manner provided by the contract. To require those arbiters to adopt any different rule of valuation, after the contract had been partly performed, and when the company was in the enjoyment of some of the benefits which were to be granted to them on its performance, would be a subversion of the rights of the appellants under the contract, which is inadmissible.

SAME—PROVISIONS OF CONTRACT.

It must further be observed that the application to vacate the appointment of the commissioners was made and granted before any appraisal or award had been made by them, and before it could be known what effect they would give to the evidence on the question of value, which they admitted, and declined to strike out. Commissioner Clark stated, in answer to the motion to strike out, that he thought the evidence was in the same line as that which was admitted on the former trial, and that he thought it ought to be received; and Commissioner Dunbar stated that he was inclined to receive it, and

APPLICATION TO REMOVE COMMISSIONERS—REASONS FOR.

give it the weight he thought proper. There was nothing in this which was final, or which showed that the commissioners might not, in arriving at a decision, be guided in their judgment by the reasoning of the general term as to the weight to be given certain portions of the evidence, and might not finally reach a just award. Some of the evidence on which Mr. Bennett had based his valuation related to facts explanatory of the capabilities of the property, which, in our judgment, was proper to be considered, and some to estimates and projects uncertain and conjectural in their character. It was certainly not impossible that, in weighing this evidence, the commissioners, enlightened by the opinion of the general term, might make the proper discriminations, and form a sound judgment in the end. There was no evidence impeaching their integrity in the matter, and the learned counsel for the respondent, in their argument in reply, expressly state that they do not charge actual dishonesty on the part of the two commissioners, but do charge an obstinate and perverse determination to follow in the forbidden paths, and on that ground claim the right to remove them before it can be ascertained, by their decision, to what result the paths alleged to be forbidden will lead them.

In answer to the objection that the removal was, to say the least, premature, they reply the finality of the second report, under the general railroad act; and on this ground demand that the appellants should be absolutely debarred of the means of enforcing their contract of sale in the manner provided by the contract, on the mere apprehension that the commissioners will, through mere obstinacy and perversity, make an excessive award against them, and that in that case they would be without remedy. Aside from other answers to this argument of the respondent, a sufficient one is that although, under the statute, the petitioners could not by appeal obtain a review, on the merits, of a second award, yet it would be within the power of a court of equity to set aside any excessive award obtained by fraud or the misconduct of the commissioners, or for any cause which would justify setting aside an award of arbitrators; and in a proceeding like this the same relief could be obtained on motion. If this application had not been made, and the commissioners had proceeded to a second award, it could have been set aside if misconduct could be shown; and the same remedy will again be open to the petitioners if the second award is impeachable for that cause. But it should not be assumed, in advance, that the commissioners will, in making their final award, be guilty of misconduct or bad faith, or wilful disregard of the legal rights of either party. In this case the apprehension that they will do so is mainly founded upon the fact that their first award was unsatisfactory to the petitioners, and was set aside by the court as excessive. The court at general term had power, on that appeal, to review the award on the merits, and order a rehearing, and

that order was not reviewable in this court. What award they will make on the rehearing cannot now be known, and the mere apprehension that it will be excessive is not sufficient to justify their being prevented from making any. Livingston *v.* Sage, 95 N. Y. 289.

We have no doubt of the appealability of the order. It was final, as it necessarily terminated the proceeding; and it affected a substantial right, as it deprived the appellants of the fruits of their contract by rendering its enforcement impossible.

The orders of the general and special terms should be reversed, and the application to vacate the order appointing commissioners, denied, with costs.

(All concur, except RUGER, C. J., and EARL, J., dissenting.)

When Commissioners' Report will be Set Aside.—See Pueblo, etc., R. Co. *v.* Rudd, 10 Am. & Eng. R. R. Cas. 404; Port Huron, etc., R. Co. *v.* Voorheis, 14 Ib. 227; Marquette, etc., R. Co. *v.* Houghton, 14 Ib. 355; *In re* Prospect Park, etc., R. Co., 14 Ib. 362; *In re* Minneapolis, etc., R. Co., 17 Ib. 122; Grafton & G. R. Co. *v.* Foreman, 20 Ib. 215; Omaha, etc., R. Co. *v.* Walker, 20 Ib. 396.

JAMISON

v.

BURLINGTON AND W. R. CO.

(*Advance Case, Iowa. October* 23, 1886.)

In proceedings by a railway company to acquire title to land under Code Iowa, § 1254, the time for taking an appeal from the assessment of commissioners begins to run from the time the assessment is actually made and reduced to writing and made public, or in some legitimate manner brought to the notice of the parties interested.

A commissioner is a competent witness to show when an assessment of damages was actually made.

A civil engineer in charge of the surveys and location of the road of a railway company in the county where the appeal is taken, and having an office in the county, *held*, to be an "agent" within the meaning of section 1254 of the Code, requiring service of notice of appeal upon the "agent or attorney" of the company.

APPEAL from Mahaska Circuit Court.

The defendant caused a sheriff's jury to be impanelled for the purpose of assessing the damages sustained by the plaintiff for the right of way over real estate owned by him. From the assessment the plaintiff appealed to the Circuit Court, and the defendant filed a motion to dismiss the appeal on the grounds that the appeal

was not taken in time, and that the notice thereof was not served upon the agent of appellant. The court overruled this motion, and a judgment was entered against defendant. A motion for a new trial being overruled, defendant appeals.

Kelley & Cooper and *John F. Lacey* for appellant.

Bolton & McCoy for appellee.

SEEVERS, J.—The award or assessment of damages returned to the sheriff by the jury states: "And it appearing that John R. Jamison had been duly notified of the proceedings herein, and of the time and place where we would view the said premises, and assess said damages, we did, on the 6th day of July, 1883, at 1 o'clock P.M., inspect and view the following premises, . . . and assess the damages the owners will sustain," etc. Such appraisement was filed in the sheriff's office on the 9th day of July, 1883. The appeal, if taken at all, was taken by the service of the requisite notice on the 6th day of August, 1883. It is provided by statute that either party may appeal from "such assessment . . . within thirty days after the assessment is made, by giving the adverse party, or, if such party is the corporation, its agent or attorney, and the sheriff, notice in writing that such appeal has been taken." Code, § 1254.

1. It is insisted by the appellant that the time stated in the return made to the sheriff is conclusive evidence of the time when the assessment was made, and that the time for taking the appeal then begins to run. We think the time for taking the appeal begins to run from the time the assessment is in fact made, reduced to writing, and is made public, or in some legitimate manner comes to the knowledge of the parties interested. Whether such time precedes the filing or placing the assessment in the hands of the sheriff we have no occasion to determine. Upon the hearing of the motion certain affidavits of some of the jurors and others were introduced in evidence, which were uncontradicted, and which fully warranted the court in finding that the jury viewed the premises on the 6th day of July, but that they in fact did not make the assessment until the 9th, the day it was filed in the sheriff's office. To the introduction of these affidavits in evidence, counsel for the defendant objected on the ground that the verdict or assessment was thereby impeached, and therefore the affidavits of the jurors were incompetent. The rule is that the evidence of jurors may be introduced to sustain a verdict, but not to impeach it, but affidavits of jurors may be received for the purpose of avoiding a verdict to show any matter which does not essentially inhere in the verdict. Wright *v.* Illinois & M. Tel. Co., 20 Iowa, 195. The assessment in question, however, was not impeached in any manner by showing when it was actually made; nor did such date inhere in and

WHEN TIME FOR TAKING APPEAL BEGINS TO RUN.

form a material part of the assessment. It was equally good, whether made on the 6th or 9th day of July, and we think the affidavits of jurors were admissible for the purpose of showing when it was actually made.

2. The notice of appeal was duly served on the sheriff and A. F. Tracy, "civil engineer and agent for said company," as appears from the return of the sheriff. The statute requires the notice to be served on the "agent or attorney" of the company. The defendant insists that Mr. Tracy was not its agent. It is not material to inquire, under the foregoing return, on whom was the burden on proof, or whether, by appearing and moving to dismiss the appeal, the defective service, conceding it to be such, was waived. It will be observed that the statute uses the general term "agent," and the kind and character of the agency is in no manner specified. From the evidence introduced below it is quite clear Mr. Tracy was the agent of the defendant for some purposes. He was the engineer in charge of the surveys and location of the road. The defendant had an office in the county, and Mr. Tracy was in charge of it. He transacted business connected with procuring the right of way, and we think the notice of appeal could be properly served on him, and that the defendant is bound thereby, for the reason that he was an agent of the defendant; and this is all the statute requires.

WHO IS AGENT.

The ruling of the Circuit Court is affirmed.

When time for taking Appeal from Assessment of Commissioners begins to run.—California So. R. Co. *v.* Southern Pac. R. Co., 20 Am. & Eng. R. R. Cas. 309; Note to Chicago & E. R. Co. *v.* Blake, 24 Ib. 295.

Chicago and Eastern Illinois R. Co.

v.

Loeb.

(*Advance Case, Illinois. March* 26, 1884.)

The plaintiff purchased certain property near the defendant railroad after it was built and in operation. He subsequently brought an action against the company to recover damages sustained from the operation of the road by throwing smoke, cinders, and ashes upon his premises. *Held*, that there can be but one response in damages on the part of a railroad company for land taken or injured by it under the law of eminent domain, and as the original owner of the property claimed to have been damaged could have sued and recovered for the depreciation of the value of the property, the right of action is in him for all damages that may have been or may be caused by the operation of the road, and there is no right of recovery in his alienee.

APPEAL from Appellate Court, first district. Case.
Wm. Armstrong for appellant.
H. O. McDaid for appellee.

SHELDON, C. J.—This was an action on the case, brought by Adolph Loeb against the Chicago & Eastern Illinois R. Co. on June 9, 1880, in the Superior Court of Cook county, to recover FACTS. damages sustained from the operation of defendant's railroad by throwing smoke, cinders, and ashes upon plaintiff's premises. Upon a trial by the court without a jury, there was judgment for the plaintiff for $1200, which was affirmed by the Appellate Court for the first district, and the defendant appealed further to this court.

The declaration avers that plaintiff was the owner of three certain lots, in Chicago, with the buildings thereon which were used for dwellings, and that defendant "wrongfully and unjustly maintained and operated, near by plaintiff's property, divers railway tracks and switches upon the street within ten feet of the property; that steam engines have passed and repassed along the property, and, in doing so, have unlawfully and unjustly caused to be thrown thereon, and deposited, in and upon plaintiff's property, large quantities of smoke, cinders, dust, soot, ashes, sparks of fire, and other substances, and in operating the same they greatly disturbed and vibrated the buildings; that, by reason of the close proximity to said premises, the defendant has constantly thrown and deposited, upon plaintiff's property, smoke, cinders, soot, dust, and ashes, and other substances, which greatly damaged the same, and depreciated the value of the property." There were two pleas—the general issue, and the statute of limitations of five years.

The following facts appear: The Chicago, Danville & Vincennes R. Co. was created, by a private charter, February 16, 1865, and during the year 1872, under its charter and the provisions of an ordinance of the city of Chicago, it built a railroad on the west side, and on one of the public streets. It used the same as a railroad until April, 1877, when all its property in this State was sold, under a mortgage foreclosure, to Messrs. Hindekoper, Dennison, and Shannon, who afterwards conveyed the same to the Chicago & Nashville R. Co.; which company consolidated with the State Line and Covington R. Co., creating the Chicago & Eastern Illinois R. Co., the defendant. The plaintiff, during the year 1876, purchased the three lots in question, being 75 feet on May street, and 125 feet on Carroll avenue, near the said railroad, which railroad had been in constant operation since 1872; and on the lots there were four tenement houses at the time of his purchase. After he purchased the lots the plaintiff purchased two more houses, and moved them on the lots, making then six houses on the lots. The plaintiff rented the houses to

tenants, and the same have, ever since he became the owner thereof, been occupied by his tenants.

At the trial the defendant submitted to the court the following proposition of law: The plaintiff in this case, having purchased the property described in the declaration after the railroad was built and in operation, he cannot recover in this action for the matters stated in the declaration, for the reason that the entire cause of action for which he is now suing was in his grantor, and it makes no difference whether his grantor sued for the same or not. The court refused the proposition, and the defendant took exception. The soundness of the above proposition is to be considered.

The position taken by appellee is that the operating of the railway caused a private nuisance to his property; that the construction of the railroad was lawful and produced no damage, but that the operation of the railroad was the sole cause of the injury; and that in such case, where the structure in itself does not cause damage, but its use, then the damage arising from the use is the cause of action; that the grantee of premises upon which a nuisance is erected is liable for damages ensuing from his maintenance of it, because every day's continuance of a nuisance is a new nuisance. There is quite a weight of authority to the effect that one may bring suit for the deterioration in value of real property from a nuisance, alleging its permanency, and that by such an action the plaintiff consents to the continuance of the nuisance, and accepts the judgment recovered as a compensation therefor; that such recovery will have the effect to give the defendant a permanent right to do the acts which constitute the nuisance as fully as though there had been a condemnation of the property by the exercise of the power of eminent domain. Section 3, Suth. Dam. 413. 414. Thus, in Elizabethtown, L. & B. S. R. Co. *v.* Combs, 10 Bush, 393, the action was for the throwing of smoke, cinders, and ashes on premises, and the court, in speaking of the right to a subsequent recovery, which was denied, say: "We have heretofore held, in actions for injury to real estate by trespassers, that the plaintiff can only recover compensation for the injury done up to the commencement of the action; but that was in case of injuries not continuing and permanent in their character. The injury in this case, if any, is permanent and enduring, and no reason is perceived why a single recovery may not be had for the whole injury to result from the acts complained of." And in Jeffersonville, M. & I. R. R. *v.* Esterle, 13 Bush, 669, which was also an action for throwing of smoke, cinders and ashes on land, the court say: "By instituting this action for damages, the lot-owner, in effect, consents that the railroad company may continue, for all future time, to use the street as it is now using it, and, as consideration therefor, to accept such judgment as

SINGLE RECOVERY FOR WHOLE INJURY.

may be therein rendered." In Central Branch U. P. R. Co. *v.* Andrews, 26 Kan. 711, an action to recover damages for interference with an alley, it is said by the court upon this point: "The plaintiff has chosen to consider the obstruction of the alley as a permanent injury to his lots—as a *quasi* condemnation, and permanent taking and appropriation, of a certain interest in his property. . . . It seems to us that he gives his consent [that his property shall be permanently appropriated] when he brings an action for such damages. It seems to us that he then consents that the railroad company shall permanently appropriate his property in the alley, for he then brings his action for damages because of such appropriation." In Fowle *v.* New Haven & N. R. Co., 112 Mass. 334, where the action was for damages caused by the building of a railroad in such a manner that at times the current of a certain stream would be thrown upon the plaintiff's land, the court say: "And if it [the injury] results from a cause which is either permanent in its character, or which is treated as permanent by the parties, it is proper that entire damages should be assessed with reference to past and probable future injury." And see Town of Troy *v.* Cheshire R. Co., 3 Fost. 83; Powers *v.* City of Council Bluffs, 45 Iowa, 652; Kansas Pac. R. Co. *v.* Mihlman, 17 Kan. 224.

It has frequently been held by this court that, in an action brought for deterioration in the value of real estate from a nuisance of a permanent character, all damages for past and future injury to the property may be recovered; and that one recovery in such action will be a bar to all future actions for the same cause. Ottawa Gas Co. *v.* Graham, 28 Ill. 73; Illinois Cent. R. Co. *v.* Grabill, 50 Ill. 242; Cooper *v.* Randall, 59 Ill. 321; Decatur Gas Co. *v.* Howell, 92 Ill. 19; Chicago & A. R. Co. *v.* Maher, 91 Ill. 312. The latter was an action of much the same character as the present. It was an action of trespass, for damage to the premises of an adjoining land-owner by the construction and operation of a draw railroad bridge across the Chicago river, on which plaintiff's property abutted, and which was used as dock property. After the bridge was constructed, and had been in operation for considerable time, Maher, who was the owner when the bridge was built, sold the premises to the plaintiff in the suit, who was his wife. The same question was presented there as here—whether the plaintiff might recover for damages she had sustained by the continuance of the obstruction since she purchased. The solution of that question was found by the court in the determination that the character of the cause of injury was such, from its permanency, that one recovery would be a bar of all future actions growing out of the erection of the structure; that Maher, the original owner, might have sued for and recovered all the damages which were sustained by the property from the erection, whether at the time or in the future; that, that being true, the right of action was in him for a

recovery of all damages that were or might be caused by the structure, and, as that right could not be transferred to his grantee, the plaintiff, there was in her no right of recovery. The distinction which appellee's counsel draws in that case, that it was one of trespass, some piles in the protection of the bridge having been actually driven in Maher's land, does not make a satisfactory discrimination. There is no significance in that action having been one of trespass, and not case, as our statute has abolished all distinctions between the actions of trespass and trespass on the case. The decision was not rested upon the point of that act of trespass committed being the only cause of action, but upon the permanent character of the structure as giving a right of recovery once for all; and the continuance of the obstruction since the purchase by the plaintiff was urged as ground of recovery in the case, which was met by the court in the manner above stated.

If the above doctrine as to entireness of recovery in one action, where the cause of injury is of a permanent kind, is to be admitted, it should apply peculiarly in this character of case. The cause of damage here is not a nuisance proper.

A railroad track laid upon a street of a city by authority of law, properly constructed, and operated in a skilful and careful manner, is not in law a nuisance. Randle *v.* Pacific R., 65 Mo. 332; Danville R. Co. *v.* Com., 73 Pa. 38. In Illinois Cent. R. Co. *v.* Grabill, above cited, it was said: "There is no complaint in the declaration of annoyance by the running of engines, the escape of steam, or otherwise, near her [plaintiff's] premises. Such consequences of the construction and use of railroads must be borne by all living near them, and without hope of redress, for they are inseparable from the purposes and objects of such structures." And see Moses *v.* Ft. Wayne & C. R. Co., 21 Ill. 516.

RAILROAD IN STREETS AS NUISANCE.

There is no complaint here that the railroad is not properly constructed, or that it was not operated in a skilful and careful manner. It belongs to the idea of a nuisance that it is abatable. In the original actions, assize of nuisance and *quod permittat prosternere*, the former being brought against the one who levied the nuisance, and the latter against the alienee of him who levied the nuisance, the judgment thereon, besides damages for the temporary loss sustained, was for an abatement of the nuisance. These actions finally went into disuse, and the action on the case became the remedy, and a party injured by a private nuisance might bring his action *toties quoties*, until the obstinacy of the party maintaining such nuisance should be overcome by repeated recoveries against him, and the nuisance be abated. 3 Bl. Comm. 222. But a railroad, or the operation of it, is not to be abated. It is built for the accommodation of the public. This is the object which justifies the exercise of the power of eminent domain, and the public wel-

fare demands that there should not be discontinuance of the operation of a railroad. Thus, there is not in such case the same reason as exists in cases of ordinary private nuisance for allowance of bringing actions as injury is done, which, as Blackstone says, will have the same effect as assize of nuisance, or *quod permittat*, "unless a man has a very obstinate as well as ill-natured neighbor, who had rather continue to pay damages than remove the nuisance."

REMEDY FOR INJURIES UNDER THE CONSTITUTIONS.

For the class of injuries here sued for there was no remedy, as we understand, previous to the constitution of 1870. The constitution of 1848 provided only that private property should not be taken for public use without just compensation. The provision for the first time was incorporated in the constitution of 1870 that "private property shall not be taken or damaged for public use without just compensation. Such compensation, when not made by the State, shall be ascertained by a jury as shall be prescribed by law." Before the adoption of the latter constitution, where there was land taken for public use, there was provision for compensation. But where there was other disconnected land not touched by the improvement, but damaged merely, as complained of in this case, no compensation was provided. To meet this want, the clause of the constitution, restrictive of the exercise of the power of eminent domain, provides that private property shall not be taken or damaged for public use without just compensation. We think it to be within the true intent and meaning of this provision as to damage that there should be but one proceeding for recovery of damage, in which there should be recovery for the entire damage, past, present, and future; that it should be similarly regarded, in this respect, as the provision in regard to the taking of property, where there is but one proceeding, and an assessment of compensation and damages once for all. The two provisions are coupled together, and are both in restriction of the exercise of the power of eminent domain.

COMPENSATION FOR TAKING PRIVATE PROPERTY —SUCCESSIVE PROPERTIES.

In respect to the awarding of compensation for the taking of private property for public use, Mills, in his work on Eminent Domain, § 216, says: "The appraisement embraces all past, present, and future damages which the improvement may thereafter reasonably produce." Had the railroad track in this case been laid over a portion of one of the these lots, then, in the condemnation proceeding for the taking of such portion, compensation would have been assessed for the value of the portion thus taken, and for the damage to the residue of the lot not taken. Such assessment would have embraced all future damage. As well here, in this case of no taking of land, might all the damages, past and future, from the operation of the railroad, be assessed as they might be to the remainder, in such supposed case of the taking of a part of the piece of land. If

there might be successive recoveries from time to time of the constantly recurring damages, then, as was said in the Grabill case, "a similar recovery might be had at every term of the court, and, in this shape, the plaintiff might recover tenfold the value of the property." We do not think that this constitutional provision intended any such result—that the just compensation given for the damaging of land might be greater than that for the taking of the land.

The just compensation to be made for damage to land was, in our opinion, intended as an indemnity, not for successive, constantly-accruing damages, as they may afterwards be suffered, but for all the damage the land-owner may suffer from all the future consequences of the careful and prudent operation of a railroad; it being the immediate damage done to the land-owner's estate by changing its permanent condition, and impairing its present value. See Heard *v.* Middlesex Canal Co., 5 Metc. 81. The action for damage may be regarded as in the nature of one kind of condemnation proceeding. Upon this point of estimation of damages, it was said in the Maher case that, the structure being permanent in its character, "it could be determined with a reasonable degree of certainty how much it depreciated the value of the land, as a permanent structure—how much less it was worth after the erection of the structure than before." This measure of damages is recognized in the cases above cited from Bush, and in Chicago & I. R. Co. *v.* Baker, 73 Ill. 316, and Chicago & P. R. Co. *v.* Stein, 75 Ill. 41; and also in Powers *v.* City of Council Bluffs, *supra*, a case of damage to premises resulting from the improper construction of a ditch, where the court say: "The plaintiff's damage was susceptible of immediate estimation. No lapse of time was necessary to develop it. It was the difference between the value of his lots as they would have been if the ditch had been properly constructed, and the value of them as they were, with the ditch as it was." Page 657. And on page 656 it was said: "If the cause of the injury is permanent, the damage can be foreseen and estimated." With so much of certainty, can the benefits or damages to real property which will result from the construction of a railroad be foreseen—that the mere location of the line of railroad has an immediate effect upon the value of real property in the vicinity, in enhancing or depreciating it? As all the damages, then, which will be sustained as the necessary result of the operation of the road, can be immediately estimated at the time of the construction and putting in operation of a railroad, from the effect on the value of the land to be damaged, it would seem to answer all just purpose of the land-owner to allow but one action, in which there might be recovery for all damages. The allowance of successive actions for damage, as it should occur from day to day, as new damage, would seem to serve but the purpose of harassing and the

wasting of means in expenses of litigation. The law does not favor the multiplying of actions.

A further view is that the plaintiff purchased the property as it was, with its surroundings. The railroad was there, and in operation, and plaintiff bought the property with the disadvantage of the railroad. The railroad must be presumed to have decreased the market value of the property from what it would have been without the road, and it is to be taken that plaintiff paid but this decreased value for the property; so that, in effect, he has been allowed for all these damages, resulting necessarily from the operation of the railroad, in the reduced price which, on that account, he paid for the property, and for him now to recover for such damages in this action would be getting for himself a double allowance for the same thing—these damages.

PURCHASE OF PROPERTY AFTER ROAD IS BUILT—DECREASED VALUE.

The conclusion is that, as the former owner could have sued and recovered for the depreciation in the value of the property caused by the railroad, the right of action was in him for a recovery of all damages that were or might be caused in the operation of the railroad, and that there is no right of recovery in his alienee, the appellee. It follows that there was error in refusing the above proposition of law, and the judgment will be reversed, and the cause remanded.

DICKEY, J.—I cannot concur in the views here expressed. I do not think our laws give to railroad companies a right by prescription in five years, without payment of compensation. If possible, I will prepare an opinion expressive of my views of this case.

The appellee thereupon filed a petition for rehearing, which was overruled, and, October 5, 1886, Scholfield J., handed down the following opinion, concurring in the judgment of the court as set out above in the opinion of Sheldon, C. J.:

SCHOLFIELD, J.—As I understand this record, I concur in the judgment rendered, and I also concur, in the main, in the reasoning of the opinion by Mr. Justice Sheldon. To avoid misapprehension, however, I prefer to state, in my own way, briefly, the grounds on which my conclusion is based. A railroad in the streets of a city, when not authorized by law, is a nuisance *per se;* and hence there may, in such cases, be recoveries by those whose property is injured thereby, from time to time, until it shall be abated. But, before the adoption of our present constitution, it was held that, where there was legislative authority, a city council might authorize the location, construction, and operation of railroads in the streets of cities, and that there could be no recovery by adjacent property

RAILROAD IN STREET—NUISANCE PER SE—CONSTITUTIONAL PROVISIONS.

holders for injuries sustained in consequence of their location, or of their construction, or of their operation in the usual and ordinary manner of constructing or operating railroads, that all damages thus arising were *damnum absque injuria*. Moses *v.* Pittsburgh, Ft. W. & C. R. Co. 21 Ill. 522 *et seq.* The only clause in our present constitution affecting the question is that which provides that "private property shall not be damaged for public use without just compensation." This court held, in Stetson *v.* Chicago & E. R. Co., 75 Ill. 74 (and the ruling has since been followed in kindred cases), that it is not indispensable to the right to construct and operate a railroad in the streets of a city that the damages occasioned thereby to adjacent property holders shall have been previously ascertained and paid; in other words, that a railroad may be lawfully constructed and operated in the streets of a city, notwithstanding it shall cause injuries to adjacent property holders, the damages resulting from which shall not have been previously ascertained and paid.

It is sufficiently accurate to say that this railroad is permanent. The company is authorized, by its charter and by an ordinance of the city council, to locate and construct its road in the street. The right to locate and construct a railroad implies the right to operate it in the usual and ordinary manner, and while the constitution requires that damages arising from injuries thereby occasioned shall be compensated, yet, according to the doctrine of the Stetson case, such injuries are not in the nature of a nuisance, for which the railroad can be abated, but are rather in the nature of a condition subsequent. It must result from the railroad being lawfully constructed in the street, and from the company having the implied right to use and operate it as railroads are ordinarily used and operated, that the railroad company has the further necessarily incidental right to injure adjacent property in the manner and to the extent that such ordinary use and operation will necessarily injure it, subject to the right of the owner to have compensation made therefor. And, the railroad being permanent, the injury must be equally permanent, affecting the property from the time the road is constructed; and a right of action therefore then accrues, on the authority of the cases referred to in the opinion of Mr. Justice Sheldon, to recover, once for all, the damages resulting from the injuries sustained to the property, and it is manifestly upon this assumption that the general assembly have provided in the Eminent Domain Act for the compensation, once for all of such damages. The authority to lay tracks in the streets measures the extent of the contemplated probable use; and, on the question of damages to adjacent property, it is therefore to be assumed that the tracks authorized to be laid may be used to the full measure of their capacity; and so, at once and ever

DAMAGES—PERMANENCY OF INJURY.

after, the character and degree of damages sustained by the adjacent property holder is patent to all.

I concede that if, after the road is constructed, authority be given by the city council, and new tracks shall be laid which were not within the authority conferred by the council when the road was constructed, and adjacent property holders shall be injured by such new tracks, or such new and more burdensome use, they may recover for the damages resulting therefrom; and I also concede that the adjacent property holders may recover from time to time for damages resulting from wilful or negligent acts as to which the company would not have been protected by its charter, and the license and the authority of the city council to lay its tracks in the streets, before the adoption of the present constitution. But the vibration caused to appellee's property, the casting of smoke, soot, etc., upon it, here complained of, I understand, result from the ordinarily prudent use and operation of the railroad as such roads are in general used and operated. The injury for which damages are claimed is that necessarily to be anticipated as resulting from the mere fact of the prudent construction and operation of a railroad in the streets of a populous city.

Owner at Time Track is Laid Can Alone Recover Damages—A Subsequent Vendee Cannot.—See Dixon *v.* B. & P. R. Co., 8 Am. & Eng. R. R. Cas. 201.

UNIACKE

v.

CHICAGO, MILWAUKEE AND ST. PAUL R. CO.

(*Advance Case, Wisconsin. November* 8, 1886.)

Where premises sought to be condemned for railroad purposes have been vacated by the tenant, have remained unoccupied, and no rent, accruing after the date of the filing of the award, has been received by the owner thereof, the sum awarded as damages bears interest from the date of such filing while an appeal from the award is pending, even though the company have paid the money into court, and have not taken possession.

In proceedings to condemn land for a railroad an expert witness may, for the purpose of impeaching his competency as an expert, be cross-examined as to the value of other real estate in the vicinity, without showing that the same was similar in character and value to the condemned property, and he may also be asked if he was not aware that several lots—part of such real estate—had been sold at sums greatly in excess of his estimate of their value.

APPEAL from Circuit Court, Milwaukee county.

In July, 1885, the appellant issued the usual statutory proceedings to condemn to its use a large amount of property in the city

of Milwaukee, including the east 50 feet of lot 15, block 86, in the Fourth ward, owned by the plaintiff, and situated on the northeast corner of Second and Fowler streets, having a frontage of 50 feet on Second street, and a depth of 150 feet on Fowler street. Commissioners were thereupon appointed by the court, who afterwards, on the 15th of August, 1885, filed their report, whereby they awarded as damages for the value of the east 50 feet condemned to the use of the appellant, $3700, and $1300 as the diminution in value of the remainder of the lot by reason of the taking and the operation of a railway over the east 50 feet; in all $5000. August 29, 1885, the plaintiff appealed from the award of the Circuit Court. October 12, 1885, the railway company paid to the clerk of the court the amount of the award, with a notification to him that defect of title to or incumbrance upon the land sought to be condemned was suggested in the petition, and requiring him to retain the money until the matter be determined by the court. The cause was tried in February, 1886, and resulted in a special verdict, finding the value of that part of the lot condemned to the use of the company to have been, on the 15th day of August, 1885, $3750, and the depreciation in value of the remainder of the lot $2000; also that the plaintiff was then and still is the owner of the lot in question. A motion by the defendant for a new trial, was denied. The plaintiff moved for judgment, upon the special verdict, for the sum of $5750, with interest from August 15, 1885, and costs, which motion was granted, and judgment thereupon entered accordingly, from which the railway company appeals to this court. On the hearing of the motion for judgment it was shown that the railway company had not taken actual possession of the land condemned.

Wilson, Graham and *Jenkins, Winkler, Fish & Smith* for respondent.

John W. Cary for appellant.

LYON, J.—1. The question chiefly argued on this appeal is that of interest. The contention on behalf of the railway company is that, inasmuch as it had not taken actual possession of the condemned premises, it is inequitable to require it to pay interest on the sum paid into court, for the use of the owner thereof, after the date of such payment. The argument is that the company is required by law to pay the money, and it should not be compelled to pay it and also to pay interest on it accruing thereafter. The general rule in this State is that, pending an appeal from the award, the sum awarded draws interest from the filing of the award. West *v.* Milwaukee, L. S. & W. R. Co., 56 Wis. 318; s. c., 10 Am. & Eng. R. R. Cas. 516. This rule rests upon the ground that, upon such filing, the money awarded becomes due and payable, although no execution can issue

INTEREST ON AMOUNT OF AWARD.

therefor until the company has been in default 60 days. There may be equitable considerations, however, which will take a given case out of the rule. For example, if the sum awarded be paid or tendered to the owner of the land condemned, instead of being paid into court (as it may be under section 1850, Rev. St., with like effect as if paid into court), no interest thereon should be allowed after such payment or tender. Again, if the owner shall receive the amount of an award which has been paid into court, interest thereon will cease from that time. It is said in some of the cases that if the owner have the profitable use of the premises, or has received rent pending the appeal, the interest should be abated accordingly. This court, in the case last cited, intimated that if the value of such beneficial use, or such rents, equal the interest, no interest should be allowed.

This case is not within either of these exceptions to the general rule. The sum awarded has not been paid or tendered to the plaintiff. On the contrary, the railway company expressly instructed the clerk of the court to withhold it from him. He did not receive the money before judgment. Indeed, the statute provides no way by which he could obtain it. On the motion for judgment it was made to appear that the condemned land was rented property; that the plaintiff's tenant left it two weeks after the award was filed; that it has since been unoccupied; and that he has received no rent therefor accruing after such filing. As to the damage to the balance of the plaintiff's lot, not taken, obviously these questions of rent and beneficial use have no application. The damage was done when the other portion of the lot was taken, and it was assessed with reference to the continued occupancy thereof by the owner.

It has been said that if the owner appeals, and is the sole occupant, interest should not be allowed. Why not? What justice or reason is there in imposing upon the owner the loss of interest because he avails himself of his statutory right to have the award of the commissioners reviewed by a court and jury? We cannot approved such a rule. Again, it has been laid down that, until possession is taken by the railway company, interest is not allowed. The reason given is that until then a *locus penitentiæ* remains to those moving the condemnation, and the money is not considered as detained. However this may be elsewhere, it will be difficult to find in our statute the *locus penitentiæ* after the award is filed, when the owner may have execution for the sum awarded if it remains unpaid for 60 days after such filing. Hence the reason of the rule last above stated fails in this State, and consequently the rule also fails.

EFFECT OF APPEAL BY OWNER—SOLE OCCUPANCY.

It should be observed that the burden is upon the party seeking to condemn land to show the existence of conditions which will operate to take a given case out of the general rule in respect to

interest. It is not sufficient to show merely that such party has not actually taken possession of the land. The fact that it has been condemned, and is liable an any time to be so possessed, will necessarily, in most cases, seriously interfere with its beneficial use by the former owner—often entirely destroy it.

The case of Feiten *v.* City of Milwaukee, 47 Wis. 494, is relied upon by counsel for the railway company as an authority against the allowance of interest in this case. There the city commenced two proceedings to condemn land for the purposes of a street, but, before any appraisal of damages and benefits was made, it abandoned both of them. The right of the city to do so was not denied. The action was brought by the owner of the land to recover damages for certain alleged acts and omissions of the city pending the proceedings, affecting the property, and for the alleged depreciation in the rental value of the property caused by the pendency of the proceedings. The nature of the case, and the grounds upon which the judgment was vested, are thus stated in the opinion: "It is only the ordinary case of incipient proceedings to condemn property to the public use, abandoned before consummation; and in all such cases if the city does not exceed its lawful authority, to the injury of the owner, pending the proceedings, it cannot be held liable for damages which the owner may incidentally sustain by reason of the proceedings. Such is the tenure by which all property subject to be taken for public use is held." Because the complaint failed to show that the city had exceeded its lawful authority, to the injury of the owner, a demurrer thereto was sustained. We have here a different case, calling for the application of different rules of law. We conclude that interest was properly allowed from the date of filing the award.

2. A witness called by the defendant, and examined as an expert, gave an opinion, on his direct examination, of the value of the land condemned. On cross-examination the court permitted him to be interrogated, and he gave his opinion as to the value of other real estate in the same vicinity, without any showing that the same was similar in character and value to the condemned property. The tendency of the testimony thus elicited, was to test the competency of the witness as an expert, and thus to enable the jury to determine intelligently the weight that should be given to his opinion of the value of the premises in question. Had witness disclosed, on such cross-examination, that he was ignorant of the value of any other real estate in that vicinity, that would have destroyed, or at least greatly impaired, the force of his opinion of the value of the land condemned. In this view, we think the interrogatories objected to were within the range of legitimate cross-examination. We must not be understood as holding that such testimony is admissible on the direct examination of an expert witness in such a case, without proof that

EVIDENCE—IMPEACHING COMPETENCY OF EXPERT.

the other real estate, concerning which he is interrogated, is similar in character, location and value to the land in question in the action. Probably it is not. Washburn *v.* Milwaukee & L. W. R. Co., 59 Wis. 364; s. c., 20 Am. & Eng. R. R. Cas. 225.

The same witness was asked, on cross-examination, concerning each of several lots (the value of which he had estimated, as before stated), whether he did not know, and whether it was not a fact, that at about the time of the condemnation proceedings, each such lot was sold at a sum named in the interrogatory, which sum was greatly in excess of the estimated value testified to by the witness. We think this was proper cross-examination. But if it was not, inasmuch as the witness denied knowledge of any such sales, no harm resulted to the defendant.

This disposes of all the grounds alleged for a reversal of the judgment, adversely to the defendant.

The judgment must be affirmed.

SEEFELD

v.

CHICAGO, MILWAUKEE AND ST. PAUL R. CO.

(*Advance Case, Wisconsin. November* 3, 1886.)

The records of conveyances of other lots in the vicinity are inadmissible on behalf of a land-owner to prove the value of land sought to be condemned by a railroad company for a right of way.

In an action to condemn lands by a railroad company for a right of way, the office of a view is to enable the jury to determine the weight of conflicting testimony respecting value and damage.

In a controversy between a railroad company and an owner of land respecting the damages sustained by the owner for the right of way proposed to be taken, the owner cannot have read, on the trial, the notice of appeal of the railroad company, in which the sum awarded him by commissioners is stated.

A land-owner is entitled to interest on the whole sum assessed by the jury as compensation for a right of way condemned by railroad company from the date of the filing of award by commissioners.

APPEAL from Circuit Court, Milwaukee county.

This is an action brought by the appellant to condemn lot 12, block 75, in the Fourth ward of the city of Milwaukee, for railroad purposes. A large number of other condemnations were included in the same proceeding. Commissioners were duly appointed and

filed their report on the 15th day of August, 1885, awarding to the respondents the sum of $10,500, which amount was paid into court on the 12th day of October, 1885, for the use and benefit of the respondent, and on the 25th day of August he appealed to the Circuit Court. The cause was tried on the 27th day of October, 1885. After the jury was sworn a view of the premises was had. On the trial of the cause a verdict was returned for the respondent for the sum of $12,987.50, and the further sum of $189.37 interest from date of filing the award to date of verdict, amounting in all to the sum of $13,176.87. A motion to set aside said verdict and for a new trial was made and denied, and afterwards, and on the 6th day of January, 1886, judgment was entered upon said verdict for the amount thereof, and the additional sum of $174.21 interest thereon from the time of the trial, and the sum of $46.68 costs, amounting in all to the sum of $13,397.76. From said judgment this appeal is taken by the defendant company.

Markham & Noyes for respondent.

John W. Cary for appellant.

LYON, J.—1. For the purpose of proving the value of the lot in question, the plaintiff offered, and the Circuit Court, against the objection of the defendant company, admitted in evidence the record of five deeds of as many lots in the same neighborhood, executed in 1885 by different grantors to John W. Cary, and of another deed of another lot, executed in 1884 by one Markham to one Thorson. Each of these deeds expressed a consideration, and they were received in evidence on the theory that the consideration thus expressed proved the price paid for each lot, and tended to show the value thereof, and, by inference, the value of the lot in question. On their face the railway company was a stranger to these conveyances, and was not bound by the recitals therein of the consideration paid. Such recitals are nothing more than *ex parte* statements of the grantors and grantees that the considerations named were paid and received for the respective lots. As between the parties thereto each of these conveyances would be evidence of the consideration paid and received, because it is an admission of the fact by all parties to it. But it is not conclusive evidence. Either party may show that the true consideration was greater or less than that named in the deed, just as a party may always deny, explain, or controvert his alleged admission against his own interest, unless they create an estoppel. As to a stranger to the deed, however, such evidence is purely hearsay. It is precisely the same in this case as it would have been had the plaintiff put a witness on the stand, and, for the purpose of proving the value of the lot in question, interrogated him as to the statements and admissions of any grantor or grantee

ADMISSION IN EVIDENCE OF RECORD OF DEEDS—CONSIDERATION EXPRESSED.

of a lot in the same vicinity, of the sum paid and accepted therefor. No one will maintain for a moment that such evidence is admissible. We think the records of the conveyances above mentioned are equally inadmissible, and for the same reasons.

It appeared later in the trial that the deeds to Mr. Cary were made for the railway company, and that the consideration expressed in each of them was the sum at which the lot conveyed had been appraised by commissoners in condemnation proceedings. Had that fact been developed when the records of those deeds were put in evidence, they would prove only the opinion of the commissioners of the value of the several lots. It would still be hearsay evidence and incompetent. If the plaintiff desired to get the opinion of the commissioners to the jury, he should have called them as witnesses, thus giving the opposite party the opportunity and advantage of cross-examination.

What is here said of the conveyance to Mr. Cary has no reference to the conveyance by Markham and Thorson. To that conveyance the railway company is an entire stranger, and there appears to be no other testimony as to the value of the lot conveyed by it.

A very liberal rule of evidence prevails in this State in the investigation of values in condemnation proceedings. Great latitude is allowed in the examination of witnesses as to value, both on their direct and cross-examination; but there are limits to such examinations, as a perusal of the cases on that subject adjudicated by this court will show. In this case we think those limits have been passed, and forbidden ground occupied, to the injury of the defendant company. Snyder *v.* Western Union R. Co., 25 Wis. 60; Hutchinson *v.* Chicago & N. W. R. Co., 37 Wis. 582; Watson *v.* Milwaukee & M. R. Co., 57 Wis. 332; s. c., 10 Am. & Eng. R. R. Cas. 168; Neilson *v.* Chicago, M. & N. W. R. Co., 58 Wis. 516; Washburn *v.* Milwaukee & L. W. R. Co., 59 Wis. 364; s. c., 20 Am. & Eng. R. R. Cas. 225.

2. The court instructed the jury as follows: "You are to determine this case from the evidence before you, and the knowledge of the premises you have acquired by a view of them, using your honest judgment, and governed by the rules of law which I have given you." Upon this instruction error is assigned.

In Washburn *v.* Milwaukee & L. W. R. Co., *supra*, the following instruction was held erroneous: "You are to determine it [the compensation] from the whole evidence that has been given you in the case—from your view. You take the view you make, you take your own knowledge, your own judgment, your own good sense." In that case the office of a view in cases like this was somewhat fully discussed, and it was held that the true and only office of such view is to enable the jury to determine the weight of conflicting testimony respecting value

INSTRUCTION TO JURY HELD ERRONEOUS.

and damage. This rule was applied in Munkwitz *v.* Chicago, M. & St. P. R. Co., 64 Wis. 403. We are of the opinion that the instruction in this case concerning the view is open to the same objections that prevailed against the instruction on the same subject in the Washburn case. The jury may have understood therefrom that they might, in the exercise of honest judgment, properly rest their verdict upon their knowledge of the lot in question acquired by the view, even though their judgment was not sustained by the proofs. If instructed on the subject, they should have been told that their knowledge acquired by the view was to be used only in determining the weight of conflicting testimony of value.

3. For the purpose of informing the jury what sum the commissioners awarded to the plaintiff, his counsel, in opening the case, persisted, under objection, in reading to them the defendant's notice of appeal, in which the sum so awarded was stated. The court ruled, against objection and due exception, that he might do so. Direct testimony of the sum so awarded would have been immaterial, and therefore inadmissible. Munkwitz *v.* Chicago, M. & St. P. R. Co., 64 Wis. 403. Probably it would also have been incompetent, as being in the nature of hearsay evidence. Of course, it was improper for the counsel, in his opening, to state a fact to the jury which his client could not be permitted to prove. However, the court instructed the jury that they could not consider the award as evidence of value, and added that the award was not in evidence. We do not determine whether the error in allowing counsel for plaintiff to state to the jury the amount of the award would, of itself, work a reversal of the judgment. We only suggest that, when the cause is again tried, it will be the safer course not to repeat the statement.

STATEMENT BY COUNSEL AS TO AMOUNT AWARDED BY COMMISSIONERS.

4. The plaintiff recovered interest from the time the award of the commissioners was filed. This is alleged as error. The subject is discussed, and the principles upon which interest is to be allowed or withheld are determined, in Uniacke *v.* Chicago, M. & St. P. R. Co., *ante*, p. 424. No repetition of what is there said is required here. An application of those principles to this case leads to the conclusion that the plaintiff is entitled to interest on the whole sum assessed by the jury, as compensation for the lot in question, from the date of filing the award.

The judgment must be reversed, and the cause remanded for a new trial.

Office of a View of the Premises in Condemnation Proceedings.—The impressions made upon the minds of jurors by the examination of premises to which the jury has been sent for such examination do not constitute a part of the evidence in the cause; and therefore it is erroneous to instruct the jury on the trial of a proceeding to condemn a right of way that, in deter-

mining the damages, the information derived from the view had by the jury of the premises through which it was proposed to construct the road should be considered as part of the evidence. Heady v. Veazy, etc., Turnpike Co., 52 Ind. 117.

In Iowa it is held that, although the juries are permitted to view the property, their finding of the value must be based upon the evidence produced in court. Harrison v. Iowa Midland R. Co., 36 Iowa, 328.

In Illinois, on the contrary, the jury have the right to view the premises, and draw their own conclusions from such observations as well as from the testimony offered in the case. Mitchell v. Illinois, etc., R. Co., 85 Ill. 566.

So in Harper v. Lexington R. Co., 2 Dana, 227, it was held that a jury of view do not necessarily decide on evidence furnished by the parties, but may find on their own judgment.

In Michigan it is held that the jury in condemnation proceedings are not bound by the testimony submitted to them, but are also expected to use their own judgment and knowledge from a view of the premises and from their own experience as freeholders. Toledo, etc., R. Co. v. Dunlap, 47 Mich. 456.

See also Washburn v. Milwaukee, etc., R. Co., 10 Am. & Eng. R. R. Cas. 168.

KITTERMAN

v.

CHICAGO, MILWAUKEE AND ST. PAUL R. CO.

(*Advance Case, Iowa. October* 7, 1886.)

The plaintiff brought action against the defendant company for taking her land and constructing its road thereon. A special interrogatory was submitted to the jury whether the defendant entered the premises as a trespasser, which was answered in the negative. The evidence showed the value of the land to be $100. The jury gave a verdict for $250. *Held*, that as the defendant was not a trespasser the verdict was clearly excessive.

APPEAL from Wapello Circuit Court.

The petition states that the defendant, without right or authority, entered upon certain real estate owned by the plaintiff, and constructed its road over and across the same, threw down her fences, destroyed her growing crops, failed to construct cattle-guards, and otherwise injured the plaintiff's premises, to her great damage. The defendant denied the allegations of the petition, and pleaded it entered upon said premises because it had the right to do so for the purpose of constructing its road. Trial by jury. Judgment for the plaintiff for $250, and the defendant appeals.

Chambers, McElroy & Carver for appellant.

W. W. Cory for appellee.

SEEVERS, J.—1. The court submitted to the jury, under proper instructions, the question whether defendant entered the premises as a trespasser, and should be ejected and removed therefrom.

This special interrogatory was answered in the negative. Counsel for the appellee insists that the interrogatory and answer cannot be considered, because it was not submitted to counsel for the appellee as provided by statute. The abstract fails to show whether the claimed fact is true or not, and we cannot presume that it was. Besides this, we are unable to discover that this question was presented in the court below at any time, and it is certain that it should not be raised for the first time here.

2. The appeal was taken on the 25th day of September, 1885. There is some controversy when the judgment was rendered, but counsel for the appellee contend it was rendered on the 21st day of the preceding March, and therefore it is claimed the appeal was not taken in time. Upon the rendition of the verdict a motion for a new trial was filed, which was overruled on the 28th day of March. An appeal lies from a refusal to grant a new trial. Code, § 3163. The appeal from the order refusing a new trial was therefore taken in time; and, as substantially the only error assigned is that the verdict is not sustained by the evidence, we think the error assigned may be considered, if the assignment is sufficiently specific, which appellee contends it is not. That error assigned is that the "court erred in overruling the first, second, and third grounds of defendant's motion for a new trial." The grounds referred to, while stated in three different ways, amount to the same thing, and embrace but a single proposition, and that is, briefly stated, that the verdict is not supported by the evidence. We think the assignment is as specific as it could be made without unnecessary prolixity.

WHETHER ASSIGNMENT OF ERROR IS SUFFICIENTLY SPECIFIC.

3. The jury found that the plaintiff's damages were $250. Under the instructions and special findings, all damages for an unlawful entry on the right of way were eliminated. The defendant entered on the premises early in August, and this action was commenced on the 4th day of October following. Because the appellee has filed an abstract making corrections in the appellant's abstract, which corrections are denied by the appellant in a subsequent abstract, we have carefully examined the transcript, and particularly the evidence of Mrs. Fetterly, a daughter of the plaintiff, on whose evidence the plaintiff relies to sustain the verdict. Appellant concedes that the plaintiff is entitled, under the evidence, to recover something, but insists that the verdict is excessive, and in this we feel forced to concur. It is not our practice to support our conclusion by a statement and discussion of the evidence, but we may say that it is claimed the witness stated that the pasture was worth $100, and therefore it is insisted the jury could well find the plaintiff had been damaged in that sum. No such conclusion can be drawn from the evidence of Mrs. Fetterly, which is exceedingly loose, uncertain, and unreliable. But if force and effect is given thereto, which the jury had the

EXCESSIVE DAMAGES.

right to do, it does not tend to show that the damages exceeded $100. This is an exceedingly liberal estimate, and we think the jury must have become confused as to the damages which, under the instruction on the theory the defendant was not a trespasser, the plaintiff was entitled to recover.

The plaintiff may, if she desires, remit in the Circuit Court $150 of the judgment, or a new trial must be granted. The defendant must have judgment for its costs in this court. Reversed.

Action of Trespass against Railroad Company—Measure of Damages—Value of Adjacent Land—Possession of Plaintiff.—The rule that the increased value given to adjacent lands by the construction of a railroad cannot be considered in determining the compensation to be paid for the right of way, is as applicable in an action of trespass brought by the owner against the railroad company to recover damages for an unlawful entry, as in an action brought by the company to condemn the right of way. It is a rule of right for the measuring of damages and is applicable in all actions in which these damages are the subject of the proceedings. To entitle the owner of land thus entered, used, and damaged to maintain trespass for such injury, it is not necessary that he should be in possession at the time of commencing his action, but only that he should have had possession at the time of the entry. Both of these questions were decided in the case of N. & G. N. R. Co. *v.* Moye, 39 Miss. 374; Natchez, Jackson & Columbus R. Co. *v.* Currie, 62 Miss. 506.

Right of Way—Measure of Damages for Land Condemned.—In the condemnation of land for a railroad right of way, the measure of damages is the difference in value of the whole tract before and after the taking of the strip condemned, and not the value of such strip viewed independently of the other parts of the tract. Balfour *v.* Louisville, New Orleans & Texas R. Co., 62 Miss. 508.

In re RUTHIN AND CERRIG-Y-DRUIDION RAILWAY ACT.

(*Law Reports*, 32 *Chancery Division*, 438)

Where the act incorporating a railway company contains a clause in the usual form that in case of the abandonment of the railway the parliamentary deposit shall be applicable towards compensating any landowners whose property may have been interfered with or rendered less valuable by the commencement, construction, or abandonment of the railway, a landowner can, as a general rule, only claim compensation on account of acts done or omitted to be done by the company under their statutory powers, and not on account of any collateral obligation entered into by the company.

But *held*, by Cotton and Lindley, L. JJ. (dissentiente Lopes, L. J.), that where a company has entered into a collateral obligation of such a nature that the breach of the obligation is necessarily involved in the abandonment of the railway and undistinguishable from it, such as a covenant to build a station, the breach of such obligation may be taken into account in assessing the diminution of value of the land.

Held, also, that a covenant to put up fences on the land taken by the company was not such an obligation as could form the subject of a claim for compensation out of the deposit.

THE Ruthin and Cerrig-y-Druidion R. Co., obtained their act, in which the Lands Clauses Act, 1845, and the Railway Clauses act, 1845, were incorporated, in the year 1876. Under the powers of this act they gave notice to Messrs. Owen and Farbridge, the trustees of the will of Mr. Thomas Hughes, that they required a portion of their land for the purposes of the railway.

On the 3d of May, 1882, an indenture was executed by which the trustees, in consideration of £725, which was to be taken in full compensation as well for the valuation of the land as for all injury by severance, &c., conveyed the parcel of land required for the railway to the company and their successors, subject to the covenants and conditions on the part of the company thereinafter contained. And by the same indenture the company covenanted with the trusteess that they, their successors or assigns, would forthwith fence out the said land thereby conveyed so as to prevent any trespass to any adjoining lands: and should make and for ever maintain and keep open a station for the use of passengers and goods upon a portion of the land therein particularly described, and make and construct and keep open necessary roads, footpaths, and approaches thereto.

The company entered on the land and made some cuttings and embankments there, but did not fence the land, nor erect the station. The line was never opened, and in the year 1884 an act was passed for the abandonment of the railway, and the company was now being wound up.

The 23d section of the Ruthin and Cerrig-y-Druidion Railway Act, 1876 (39 and 40 Vict. c. lxxxi.), enacted that in case of the abandonment of the railway the parliamentary deposit "shall be applicable . . . towards compensating any landowners or other persons whose property may have been interfered with or otherwise rendered less valuable by the commencement, construction, or abandonment of the railway, or any portion thereof, or who may have been subjected to injury or loss in consequence of the compulsory powers of taking property conferred upon the company by this act, and for which injury or loss no compensation, or inadequate compensation, shall have been paid, and shall be distributed in satisfaction of such compensation as aforesaid in such manner and in such proportions as to the Chancery Division of the High Court of Justice may seem fit."

The land taken by the company had been offered to the trustees, who were willing to re-purchase it, but the terms upon which the re-purchase should take place had not yet been fixed.

The trustees of Mr. Huges' will took in a claim in the chambers of Vice-Chancellor Bacon to be compensated to the extent of £600 out of the parliamentary deposit on the ground that the estate had been damaged and rendered less valuable by the commencement, construction or abandonment of the railway. The principal causes

of damage relied on were the failure of the company to put up proper fences on the land, and their failure to build a station as agreed. They also relied on the loss of railway access to the estate by the abandonment of the railway. Numerous affidavits were filed by the claimants and by the liquidator of the company. In opposition to the claim evidence was given that the proposed station would not have added any value to the estate, because there was another station within five minutes' walk called Rhewl station, on the Denbigh, Ruthin and Corwen Railway, connecting those towns, and that there were no other markets in the neighborhood. It was also in evidence that the trustees had opposed the passing of the company's act of incorporation through Parliament on the ground that the construction of the railway would depreciate the value of the estate as a building site, and had obtained an amount of compensation much beyond the agricultural value of the land. The company also sought to prove by their affidavits that no fences were necessary on the land beyond those which existed before the commencement of the railway.

The chief clerk made his certificate on the 10th of December, 1885, and thereby refused to allow any compensation to the trustees, and Mr. C. W. Farbridge, who had survived his co-trustee, applied to the Vice-Chancellor to vary the certificate. The vice-chancellor refused the application, holding that the claim was not within the act and also that the claimant had proved no diminution in the value of the estate, and Mr. Farbridge appealed from his decision.

Barber, Q.C., and *Methold* for appellant.

Swinfen Eady (*Millar*, Q.C., with him) for liquidator.

VALUE OF LAND LESSENED BY ABANDONMENT OF RAILWAY.

COTTON, L. J.—In this case the Ruthin and Cerrig-y-Druidion Railway has been abandoned, and the question has been raised whether the appellant has made out that his land has been lessened in value by the abandonment of the railway, and that he has a claim for compensation out of the parliamentary deposit. The claim depends on the 23d section of the act by which the company was established, which is in the usual form, and provides for the compensation of landowners whose land has been rendered less valuable by the abandonment of the railway. I say "by the abandonment of the railway," because although the act uses the words "rendered less valuable by the commencement, construction, or abandonment of the railway," the appellant makes no claim except in respect of the abandonment of the railway. We had those words before us recently in the case of *In re* Potteries, Shrewsbury, and North Wales R. Co., 25 Ch. D. 251, in which we decided that the words "by the commencement, construction, or abandonment of the railway" were disjunctive, and the landowner's claim in this case is

confined to injury from the abandonment of the railway. There are two special matters with respect to which the claim is brought, and the question we have to determine is whether the appellant has made out that his land has been materially lessened in value in respect of these matters by the abandonment of the railway. In the case to which I have referred, the court not only decided that the words must be read disjunctively, but also laid down that the diminution in value must be estimated by comparing the value of the land immediately before and its value immediately after the abandonment. In the present case a further question arises, namely, whether the compensation must be confined to loss occasioned by the action of the railway company under its statutory powers alone. The two special matters in respect of which the appellant claims are these:

WHAT TO BE TAKEN IN ACCOUNT IN ESTIMATING COMPENSATION.

One is in respect of a covenant by the company to make a station on the land taken; and the other of a covenant to put up fences where a deep cutting had been made; and the point to be considered is, how far the breach of these covenants can be taken into account in estimating the diminution in the value of the land due to the abandonment of the railway. It is clear that damages for a mere breach of covenant do not come within the section of the act of Parliament; but I think you must take into account all the incidents before and after the abandonment; and there may be cases where there is such a covenant that the mere abandonment of the railway makes its performance impossible, and in such case I am of opinion that the consequent loss may be taken into account in estimating the deterioration of the value of the land. I think the covenant to build the station in this case was one of that nature. It was one which might have materially affected the value of the property, for a station meant not a mere building, but a place where the trains were to stop on the railway. But where there is no railway there can be no station; therefore the abandonment of the railway is of necessity a breach of the covenant to make the station.

Having stated this, I come to the question: Has the claimant made out his case by the evidence which he has produced? That seems to me the real question on this claim. It is for him to prove that there has been a diminution in value caused by the non-erection of the station. In my opinion he has not done so. At first sight it seemed impossible that the non-erection of the station should not be a loss to the property; but it appears from the evidence that there is already a station in the immediate neighborhood, and although something was said about opening up the country, it was not shown that the traffic at the proposed station would have been anything different from that at the existing station. It is not immaterial, though not conclusive, that when the company's bill was before Parliament the trustees opposed it on the ground that

DIMINUTION IN VALUE CAUSED BY NON ERECTION OF STATION.

its construction would prove an injury to the property. It is manifest, also, with regard to the evidence of the value of the property before and after the abandonment, that there can be no real difference between the value immediately before and immediately after the abandonment when, as in this case, it was obvious for some time that the scheme had failed and that there was no reasonable prospect of the company carrying it on. On the whole I am of opinion that the claimant has failed to make out a case of injury from the non-erection of the station.

COVENANT TO MAINTAIN FENCE.

As regards the other point, namely, the covenant to put up and maintain the fence, the abandonment of the railway did not necessarily involve the breach of the covenant to make fences. I therefore doubt whether it is a case in which the covenant could be taken into account in assessing the deterioration of the land in value. But in this case, also, the claimant has entirely failed to show by his evidence that the failure to make the fences has caused any diminution in value to his estate.

The appeal must, therefore, be dismissed on both points.

LINDLEY, L. J.—I am of the same opinion and for the same reasons, but as the question is a difficult one, I think it right to say a few words. The 23d section of the company's act is in the common form providing how the deposited sum shall be applied. [His Lordship read the section.] Here there are no words which point to injury arising from a breach of covenant by the company. The reason is obvious, that on the abandonment of the railway the right of proof against the covenanting parties for breach of covenant still remains. We must be careful not to extend the meaning of the words of the section.

ABANDONMENT OF RAILWAY AND BREACH OF COVENANTS DISTINGUISHED.

In this case the railway company entered into covenants to erect a station and to make fences on the land taken. Consider the effect in two points of view. The mere existence of such a covenant may increase the value of the land, but we must not confuse the abandonment of the railway with a breach of covenant. The abandonment may diminish the value of the land. The railway may be made but the covenants be broken, or the railway may be abandoned and yet the the covenants be performed. If the abandonment and the breach are undistinguishable, then the case may be within the act; but when you can distinguish between the breach of covenant and the abandonment you can only claim in respect of the abandonment.

Such a claim requires careful scrutiny. In the case cited of *In re* Potteries, Shrewsbury and North Wales R. Co., 25 Ch. D. 251, it was established that some injury was done, and we directed an inquiry as to the amount. In the present case there has been an inquiry, and the claimant fails to show that the the property has

been diminished in value. It is altogether a strange story. The claimant first complained that the property would be injured by the construction of the railway, now he complains that it has been injured by its abandonment. At first I thought there was something in the claim on the covenant to build a station, for the abandonment of the railway would necessarily involve a breach of that covenant. But the claimant has not made out his case on the evidence. The existence of another railway and a station so close to the proposed station has prevented him from proving that he has suffered any loss from the non-erection of the station covenanted to be erected. Then as to the other claim, for not putting up the fences, I do not believe that this has in any way diminished the value of the property. Therefore, on both claims he has failed to make out his case.

LOPES, L. J.—The question turns on the effect of the act. The claimant seeks compensation in respect of the abandonment only. I do not put so liberal a construction upon the section referred to as the other Lords Justices. The section says that the deposit is to be applied towards compensating any land-owners whose property may be interfered with or rendered less valuable by the commencement, construction, or abandonment of the railway, or loss in consequence of the compulsory powers conferred on the company by this act. In the case cited *In re* Potteries, Shrewsbury & North Wales R. Co., 25 Ch. D. 251, it was held that these words were to be read disjunctively. Here we have only a claim in respect of the abandonment of the railway. It is material to consider what is meant by the depreciation being caused by the abandonment. In my opinion, it means depreciation solely caused by what is done by the company under the authority of Parliament, or by the non-exercise of its statutory powers. It is only in respect of this that the land-owner can claim compensation, and the court cannot increase the compensation on account of any collateral obligation incurred by the company. In a case like the present, the land-owner is entitled to say that owing to the abandonment of the railway he has lost the advantages of the railway, but he cannot call in aid the fact that by that abandonment arrangements made outside the act have become impracticable. That is my view of the meaning of the section. With respect to the measure of the injury, it has been laid down in *In re* Potteries, Shrewsbury & North Wales R. Co., that it is to be determined by the value of the land immediately before and immediately after the abandonment. That is a decision by which I am bound, although it seems to me that the value of the land must be very much the same immediately before and immediately after the act of abandonment; because notice of the intention to

EFFECT OF ACT—DEPRECIATION CAUSED BY ABANDONMENT.

abandon the railway must be given some time before the abandonment, and after that time there cannot be much change in the value of the land.

With respect to the question of fact—Has the land been rendered less valuable by the abandonment?—I am clearly of opinion that it has not been rendered less valuable. It is a very bold thing for the appellant to contend that it has. I believe that if the land had been put into the market immediately before and immediately after the abandonment, the value would have been found to be much the same. And I say it is a bold thing for the appellant to contend that there has been a depreciation, because before the bill passed through Parliament the trustees tried to throw out the bill on the ground that the making the railway would be injurious to the property, and now the appellant seeks compensation on the ground that the abandonment has been highly injurious. For every reason, therefore, I am of opinion that the claim was properly disallowed; and that this appeal must be dismissed with costs.

WHETHER LAND IS RENDERED LESS VALUABLE BY ABANDONMENT.

Robinson, Preston, & Stow for appellant.
Rooks & Co. for respondent.

Abandonment—Company's Liability for Loss to Land-owner.—Where, after a railroad company had constructed its road by authority of law through plaintiff's land, condemned for that object, they were authorized to alter the location of their road between two given points. They reconstructed their road, and abandoned that part which had been made through the plaintiff's land. *Held*, that the authority derived from the legislature to alter the location did not exempt the company from liability to the plaintiff for the loss sustained by him by reason of such abandonment. Railroad Co. *v.* Compton *et al.*, 2 Gill (Md.), 20.

In Kinealy *v.* St. Louis, etc., R. Co., 69 Mo. 658, it was *held* that where there is no question of contract involved, an individual who has sustained damage only in common with others from the abandonment cannot maintain an action.

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NOTE.—The mode of citing the American and English Railroad Cases is as follows:

27 Am. & Eng. R. R. Cas.

The index contains references to the decisions and to the notes. References to the decisions are to the pages upon which the cases begin. References to the notes are to the pages upon which the propositions stated in the index are found. References to Constitutional or Statutory Provisions are to the pages upon which they are cited.

ABANDONMENT.

See EMINENT DOMAIN.

Issue as to exemplary damages. To withdraw a claim for exemplary damages from the consideration of the jury simply by a verbal declaration by counsel of its abandonment, made after the evidence is closed, and during argument, is not sufficient. It should be withdrawn from the consideration of the jury in the charge of the court, distinctly calling their attention to the fact that it is abandoned, and charging them as to the remaining issues. International, etc., R. Co. *v.* Underwood (Tex.). 240.
Loss to landowner: company's liablity for. 440 *n*.

AGENTS.

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ANIMALS.

Contract to carry, construed, and railroad company *held* not liable for failing to care for stock after it was unloaded. Myers *v.* Wabash, etc., R. Co. (Mo.). 53.
Delay of: damages for. 59 *n*.
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Release of liability. Contract by Grand Trunk R. Co. in Canada, relieving it from liability for negligent injury of animals carried by it, *held* illegal. Grand Trunk R. Co. *v.* Vogel (Can.). 18.

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Eminent domain. When time for taking appeal from assessment of commissioners begins to run. 415 *n.*
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Connecting lines: liability of last carrier for lost or injured baggage. 271 *n.*
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Duty of company. Liability for loss. "It is the duty of a railway company to have baggage ready for delivery on the platform at the usual place of delivery, until the owner, in the exercise of due diligence can call and receive it; and it is the owner's duty to call for and receive it within a reasonable time." Therefore, where a passenger on arriving at his destination deliberately refrained from applying for his baggage on being told by his cabman that he could not conveniently take it, and on sending for it, on the following morning, one of three trunks could not be found, *held*, in an action to recover the value of the trunk and the wearing apparel it was said to contain, that the liability of the railway company as common carriers had ceased; a nonsuit was ordered to be entered. The only claim (if any) which the plaintiff, under the circumstances, had against the company was as warehousemen or bailees. Vineburg *v.* Grand Trunk R. Co. (Ont.). 271.

BAGGAGE—*Continued.*

In an action against a railroad company for the value of a trunk lost on a connecting line before it reached the defendant's road, a nonsuit was properly ordered, there being no evidence of a joint contract between the two railroads. Felder *v.* Columbia, etc., R. Co. (S. C.). 264.

Loss of: when carrier's liability ceases. 280 *n.*

Money intended for trade, business, or investment, or for transportation and not intended for the passenger while travelling, is not luggage. Pfister *v.* Central Pac. R. Co. (Cal.). 246.

Money: liability of company for, shipped as baggage. 256 *n.*

—— Passenger carrying as baggage may be compelled to pay freight. 256 *n.*

Warehouse: loss in. Railway company delivered to owner certain goods which were in its warehouse, taking his receipt therefor. By arrangement between the owner and the warehouseman and baggageman, a part of the goods were left in the warehouse and subsequently lost. The baggageman had no authority to make any contract for the company. *Held*, that the company was not liable for the goods lost, the baggageman permitting part of the goods to remain in the warehouse being his private arrangement, to which the company was not a party. Mulligan *v.* Northern Pacific R. Co. (Dak.). 33.

What does and what does not constitute. 256 *n.*

BAILMENT.

See BAGGAGE.

Bailee may sue for interference with his special property. Lockhart *v.* Western & Atlantic R. Co. (Ga.). 47.

Borrower acquires no property in thing loaned, but only the right to possess and use it, and for any interference with that right he may maintain an action. Lockhart *v.* Western & Atlantic R. Co. (Ga.). 47.

BILL OF EXCEPTIONS.

See PRACTICE.

BILL OF LADING.

See COMMON CARRIER.

BRIDGE.

Duty of company is to inspect, etc. Louisville, etc., R. Co. *v.* Thompson (Ind.). 88.

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COMMON CARRIER.

See BAGGAGE; CONNECTING LINES; PARTNERSHIP; PASSENGER; PENALTIES; RATES; TICKET; TROVER.

Agency. Carrier who receives goods to be carried over its own lines, and over successive lines of transportation connected therewith, to be delivered at some distant point, acts as a forwarding agent of the owner in giving instructions as to the transportation of the goods, and in case of a mistake by the first carrier in directing the goods, the last carrier will have a lien upon them for the freight earned by it, unless the owner gave notice of

COMMON CARRIER—*Continued.*

the route and the lines of road over which his goods were to be transported. Bird *v.* Georgia R. Co. (Ga.). 39.

Borrower's right to recover damages for picture lost by railroad company. Suit for destruction of oil-painting by railroad over which it was shipped was brought by the sister of the owner and consignee, and on the trial she testified that her brother had suffered her to keep the picture until called for, and if never called for it was to be her property, it being an heir-loom in the family, and prized by her on that account, and that she was responsible for its delivery to him. *Held*, that plaintiff had no property in the picture, general or special, and could not sue in her own name, and that the action for the destruction of the picture should have been brought in the name of the owner. Lockhart *v.* Western & Atlantic R. Co. (Ga.). 47.

Change of route. Lien for freight. If goods were shipped over a connecting line of roads, and there were two routes by which the terminal point could be reached, one of which was designated by direction of the consignee, who is also the owner, but they were, in fact, sent to the terminal point by the other route, if the road so wrongly receiving them knew of the direction as to their shipment when it received them, its transportation of the goods would be voluntary. It would have no right to charge freight for transportation, would have no lien on the goods for such charges, and could not retain possession for the purpose of collecting them. Bird *v.* Georgia R. Co. (Ga.). 39.

Connecting lines. Each carrier is liable for the result of its own negligence, and although the first carrier may have assumed the responsibility for the transportation to a point beyond its own route, any of the subsequent or connecting lines to whose negligence the loss or injury can be traced will also be liable to the owner. Atchison, etc., R. Co. *v.* Roach. 257.

—— Joint contract. The sale of a through ticket over two or more connecting lines of railroad is not evidence of a joint contract beetwen such roads whereby one should become responsible for the default of another. Felder *v.* Columbia, etc., R. Co. (S. C.). 264.

—— Where a passenger purchased a through ticket over a line of railroads, having a coupon attached for each road, and checked his baggage through to his destination, if, upon his arrival, it was found to be lost, he could hold the last road of the line responsible therefor. Savannah, etc., R. Co. *v.* McIntosh (Ga.). 269.

—— While a railroad company cannot be compelled to transport beyond its termini, it is well settled that it may lawfully contract to carry passengers and property, over its own and other lines, to a destination beyond its route, and when such a contract is made, it assumes all the obligations of a carrier over the connecting lines as well as its own. Atchison, etc., R. Co. *v.* Roach. 257.

Consignees may sue for freight lost in transit. Kirkpatrick *v.* Kansas City, etc., R. Co. (Mo.). 51.

Delay may be excused by proof of misfortune or accident, although not inevitable or produced by act of God. Kinnick *v.* Chicago, etc., R. Co. (Ia.). 55.

Delivery. Failure to deliver a car-load of mules on time. *Held*, that the measure of damages is the difference in the market value of the stock at the designated place of delivery when it should have been, and when it was, in fact, delivered there, and if there was no market value at that point, such value may be ascertained by proof of the market value at other convenient points. East Tennessee, etc., R. Co. *v.* Hale (Tenn.). 86.

Delivery to consignee. 35 *n.*

Delivery: what constitutes. 50 *n.*

Demand and refusal not necessary when the fact was that the goods never reached the place where such demand and refusal must have been made, if at all. Louisville & Nashville R. Co. *v.* Meyer (Ala.). 44.

COMMON CARRIER—*Continued.*

Duty of the carrier is confined, as is provided in the Code of California, to accepting and carrying property "of a kind that he undertakes or is accustomed to carry." Pfister *v.* Central Pac. R. Co. (Cal.). 246.

Escape of cattle. Mere permission by agent of railroad company to an owner of cattle to place them in the company's yards, no bill of lading being given, does not render the company liable for damages caused by the escape of the cattle. Fort Worth, etc., R. Co. *v.* Perkins (Tex.). 49.

Excuse for loss of goods. When loss or damage to goods occurs while they are in the custody of the carrier, though carried at owner's risk, the carrier must make at least a *prima facie* showing that it was not caused by his negligence. South, etc., R. Co. *v.* Wilson (Ala.). 41.

Failure to ship. Where court states to jury that "defendant sets up no excuse for a failure to ship, if there was such failure," it is not error, being merely in effect telling the jury that the defendant had not set up any legal excuse for failing to ship the goods. McGowan *v.* Wilmington, etc., R. Co. (N. C.). 64.

Hogs injured by "piling up" while struggling to get near to or away from the car-doors. *Held*, that common carrier is an insurer against such injury, and that the carrier should unload hogs or give them personal attention, so as to prevent such injury while a train is delayed. Kinnick *v.* Chicago, etc., R. Co. (Ia.). 55.

Joint liability of connecting lines. The complaint alleged that plaintiff purchased at A a through ticket to C, over railroad lines E and F, and on the route lost her trunk, for which she demanded damages of F. *Held*, that in failing to allege that E and F were joint contractors, or that the trunk had been received by F, the complaint did not state facts sufficient to constitute a cause of action. Felder *v.* Columbia, etc., R. Co. (S. C.). 264.

Liability beyond terminus. When carrier receives goods consigned to a place beyond his own line, and does not limit his liability by express contract, he assumes the duty and obligation to deliver them safely at the place of destination, and is liable for a loss occurring on any part of the route. Louisville & Nashville R. Co. *v.* Meyer (Ala.). 44.

Liability of common carrier to borrower for damage to borrowed goods. 49 *n.*

Limitation of liability by bill of lading. Assent thereto not inferred but from the acceptance of a bill of lading sent by mail to the shipper after the goods were *en route*. Louisville & Nashville R. Co. *v.* Meyer (Ala.). 44.

Limiting liability. Statute of Iowa prohibiting corporations engaged in transporting goods and passengers between different States from limiting their liability as common carriers by contract is not a regulation of interstate commerce. Hart *v.* Chicago, etc., R. Co. (Ia.). 59.

Marks on goods *held* competent evidence of route over which they were to be carried. Bird *v.* Georgia R. Co. (Ga.). 39.

May limit his liability to loss on his own line, but must bring such limitation to the notice and secure the assent thereto of the consignor. Louisville & Nashville R. Co. *v.* Meyer (Ala.). 44.

Property injured in transit by the act of the owner: *held*, company not liable for. Hart *v.* Chicago, etc., R. Co. (Ia.). 59.

Shipment of goods. Where a bill of lading provides against any liability of the carrier for "wrong carriage or wrong delivery of goods that are marked with the initials, unnumbered or imperfectly marked," and it is not a part of the plaintiff's complaint that the rice was wrongly carried or wrongly delivered, and no defence is set up that the goods were not marked with the proper directions, nor any imperfection in that respect brought to the attention of the plaintiff, but the sole ground of action is that the goods were not shipped at all, the only question is whether the goods were shipped or not. McGowan *v.* Wilmington, etc., R. Co. (N. C.). 64.

State may enforce railway regulations with fines and penalties. McGowan *v.* Wilmington, etc., R. Co. (N. C.). 64.

Statute regulating time of shipment. Where the charter of a railroad company provides that its officers may establish its prices, rates of freights and

COMMON CARRIER—*Continued.*

fares, in their discretion not exceeding a maximum rate, prescribed a statute compelling railroad companies to ship within a reasonable time goods delivered to them for shipment, which time is declared to be within five days next after delivery, applies to such railroad, and is not void as impairing the obligation of the contract as between it and the State. McGowan *v.* Wilmington, etc., R. Co. (N. C.). 64.

Time of shipment by carrier implied to be a reasonable time in the absence of any express contract, and the statute of North Carolina fixes such reasonable time as within five days next after receipt of the goods. McGowan *v.* Wilmington, etc., R. Co. (N. C.). 64.

Time of shipment. Instructions. In action against railroad company to recover a statutory penalty for failing to ship a certain lot of rice delivered to it for shipment, it is not error to exclude the question asked of defendant's witness, "Did persons who delivered rice for the plaintiff give any instructions at the time of delivery in regard to the time of the shipment?" when the sole question at issue is whether defendant did or did not ship the rice. McGowan *v.* Wilmington, etc., R. Co. (N. C.). 64.

Title. Carrier cannot dispute title of person delivering goods to him for transportation by setting up title in himself or a third person. Lockhart *v.* Western & Atlantic R. Co. (Ga.). 47.

Title to goods passes to consignee, who pays a draft drawn on him by the shipper, and receives the bill of lading to which the draft is attached, and subsequently purchases the goods from the owner, and it makes no difference that the goods were destroyed before the absolute sale, as the property of the owner in them still continued, and was the subject of transfer, and the transferee could maintain action for damages for their destruction on the ground of such transfer. Kirkpatrick *v.* Kansas City, etc., R. Co. (Mo.). 51.

Waiver of defences. When compensation is demanded of a railroad company for damages to goods transported, and the demand is refused on the ground that the goods were carried at the owner's risk, this is a circumstance from which the jury may infer a waiver of all other grounds of defence, and an admission that the goods were damaged while in possession of the carrier. South, etc., R. Co. *v.* Wilson (Ala.). 41.

Waiver. Where there is no misrepresentation on the part of a shipper of live-stock, a common carrier waives all exceptions to defects in loading by accepting stock as loaded for transportation. Kinnick *v.* Chicago, etc., R. Co. (Ia.). 55.

Where shippers were to take charge of sheep in transit, and to unload them, *held* that the company is not liable for injury to the sheep after they were unloaded. Myers *v.* Wabash, etc., R. Co. (Mo.). 53.

CONDEMNATION.

See EMINENT DOMAIN.

CONNECTING LINES.

See COMMON CARRIER.

Baggage. Liability of connecting lines of carriers for loss of baggage. 264 *n.*

—— Liability of last carrier for lost or injured. 271 *n.*

CONTRACT.

As to appraising damages for land taken for railway purposes. *In re* Petition of, etc., *v.* Bennett (N. Y.). 404.

CONSTITUTIONAL LAW.

Interstate tariffs not subject to regulation by State railroad commissioners. State *v.* Chicago & Northwestern R. Co. (Ia.). 15.

Interstate tariffs. Statute authorizing railroad commissioners of State to fix interstate rates, *held* unconstitutional. Commonwealth *v.* Housatonic R. Co. (Mass.) 31.

Limiting liability. Statute of Iowa prohibiting corporations engaged in transporting goods and passengers between different States from limiting their liability as common carriers by contract, is not a regulation of interstate commerce. Hart *v.* Chicago, etc., R. Co. (Ia.). 59.

Statute regulating time of shipment. Where the charter of a railroad company provides that its officers may establish its prices, rates of freights, and fares, in their discretion, not exceeding a maximum rate, prescribed a statute compelling railroad companies to ship over their roads within a reasonable time goods delivered to them for shipment, which time is declared to be within five days next after delivery, applies to such railroad, and is not void as impairing the obligation of the contract as between it and the State. McGowan *v.* Wilmington, etc., R. Co. (N. C.) 64.

DAMAGES.

See DEATH; EMINENT DOMAIN; EVIDENCE.

Abandonment of claim for. See ABANDONMENT.

Delay of goods in transit. Measure. 88 *n.*

Delivery. Failure to deliver a car-load of mules on time. *Held*, that the measure of damages is the difference in the market value of the stock at the designated place of delivery, when it should have been, and when it was, in fact, delivered there, and if there was no market value at that point, such value may be ascertained by proof of the market value at other convenient points. East Tennessee, etc., R. Co. *v.* Hale (Tenn.). 86.

Emancipated minor child: right to recover damages for death of. 325 *n.*

Eminent domain. Decrease of rental value competent evidence to show damage to property. 408 *n.*

—— Measure of. Value of adjacent land. 434 *n.*

—— Measure. Cash market value of land taken for a railroad is the proper measure of damages for the land so taken; and as to lands damaged, the measure of damages is the difference between the value of the land before, and its value after, the construction of the road. Wabash, etc., R. Co. *v.* McDougal (Ill.). 386.

—— Owner at time land is taken can alone recover damages. 392 *n.*

—— Owner at time tract is laid can alone recover damages; a subsequent vendee cannot. 424 *n.*

—— When commissioners' report will be set aside. 413 *n.*

Excessive, for land taken. The plaintiff brought action against the defendant company for taking her land and constructing its road thereon. A special interrogatory was submitted to the jury whether the defendant entered the premises as a trespasser, which was answered in the negative. The evidence showed the value of the land to be $100. The jury gave a verdict for $250. *Held*, that as the defendant was not a trespasser, the verdict was clearly excessive. Kitterman *v.* Chicago, etc., R. Co. (Iowa). 482.

Exemplary: duty of instructing jury as to. International, etc., R. Co. *v.* Underwood (Tex.). 240.

Exemplary, for expulsion of passenger. 191 *n.*

Four thousand dollars excessive. While the verdict of a jury should not be interfered with upon the ground that it is excessive unless it is flagrantly so, the court holds that a verdict for $4000 in this case is flagrantly excessive, and requires a reversal. South Cov., etc., R. Co. *v.* Ware (Ky.). 206.

Future disability. To justify the assessment of damages for future or perma-

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nent disability, it must appear that continued or permanent disability is reasonably certain to result from the injuries complained of. Ohio, etc., R. Co. *v.* Cosby (Ind.). 339.

Husband and wife. An instruction is erroneous which authorized the jury to include in their assessment the damages recoverable by the husband, as well as those which the wife might recover for her separate use. Her recovery is limited to the injuries to her person, including pain, anguish of mind, and all such other damages resulting from the negligence of the railroad company as were not presumptively injuries to the husband. Ohio, etc., R. Co. *v.* Cosby (Ind.). 339.

Injury by expropriation. Measure. Where the injury done to property by the construction of a railroad is at once fully completed and permanent, the entire damage is to be measured by the condition in which, when completed, it left the property. In such a case the proper measure of damages is the diminution in the value, not of the rental, but of the property. Baldwin *v.* Chicago, etc., R. Co. (Minn.). 402.

Medicines and medical treatment not allowed for where none were shown to have been given. Eckerd *v.* Chicago, etc., R. Co. (Ia.). 114.

Noise, smoke, etc., as elements of, in condemnation proceedings. 386 *n.*

Nursing expenses not recoverable where none proved. Nichols *v.* Dubuque, etc., R. Co. (Ia.). 183.

Opinion evidence as to amount of damage not admissible. 309 *n.*

Recovery for services necessary to ameliorate the condition and suffering of the plaintiff can be had, although gratuitously rendered, when a recovery for negligence of defendant can be had. Pennsylvania Co. *v.* Marion (Ind.). 132.

Right of way. Eight hundred dollars *held* not an excessive award against a railroad company for taking a strip of land, about 900 feet in length, across two patented mill-sites, and a right of way over a lode claim. Golden Boulder, etc., R. Co *v.* Haggart (Col.). 375.

Rule as to. In an action for a personal injury, the plaintiff is entitled to recover compensation, so far as it is susceptible of an estimate in money, for the loss and damage caused to him by the defendant's negligence, including not only expenses incurred for medical attendance, and a reasonable sum for his pain and suffering, but also a fair recompense for the loss of what he would otherwise have earned in his trade or profession, and has been deprived of the capacity of earning, by the wrongful act of the defendant. Vicksburg, etc., R. Co. *v.* Putnam (U. S. S. C.). 291.

Subsequent vendee. The owner of land cannot recover for damages which accrued to it before he purchased it. Wabash, etc., R. Co. *v.* McDougal (Ill.). 386.

The small bone of the plaintiff's leg was fractured at the ankle, and some of the ligaments were ruptured. In consequence of this he was laid up not over eight weeks. The fracture has united perfectly, and will never trouble him; the ligaments have not healed entirely, but will not trouble him save in going up or down hill, or when there is a change of weather, and then he will feel like one with a sprained ankle. No special damage was averred, and no circumstances of aggravation shown. *Held*, that a verdict for $4000 is disproportionate to the injury. South Cov., etc., R. Co. *v.* Ware (Ky.). 206.

Twelve thousand dollars not excessive for killing a man. International, etc., R. Co. *v.* Ormond (Tex.). 140.

Twenty-five hundred dollars not excessive damages for killing a man fifty-five years old, in fair health, and capable of earning two dollars and twenty-five cents per day of ten hours, and having a family dependent on his labor for support. Annes *v.* Milwaukee, etc., R. Co. (Wis.). 102.

Worldly circumstances. In an action against a railroad company for an injury to the plaintiff's eye, caused by a spark or cinder from the defendant's engine, there was no error in refusing to permit the plaintiff to prove that

DAMAGES—*Continued.*

the defendant was worth from two to three hundred thousand dollars. Higgins *v.* Cherokee R. Co. (Ga.). 218.

Worldly circumstances. Except in cases where the entire injury is to the peace, happiness, or feelings of the plaintiff, worldly circumstances should not be admitted or weighed in the ascertainment of damages. Georgia R. Co. *v.* Homer (Ga.). 186.

DEATH.

See DAMAGES.

Measure of damages. The keeper of a railroad section house, whose usual earnings had been from fifty-five to one hundred dollars a month, was killed by the negligent conduct of the servants of a railway company in running one of its trains. In an action by the widow and child for damages resulting, *held*, that no standard by which to estimate damages for negligently killing a man can be fixed by reference to what he was earning when he died. The additional experience and skill which he might acquire in some of the years of life of which he was deprived would increase his wages, and create an element of uncertainty in fixing any arithmetical standard. In the absence of any standard, since the size of the verdict did not show any evidence of passion or prejudice, the verdict for $12.000 could not be pronounced clearly excessive. International, etc., R. Co. *v.* Ormond (Tex.). 140.

Minority of deceased. Action brought in Missouri by a husband and wife, residents of the State of Texas, for the death of their minor son, who was also a resident of Texas, the laws of Missouri, and not of Texas, will determine the question of the minority of the son. Besides, in the absence of any evidence to the contrary, it will be presumed that the age of majority is the same in Texas as it is in Missouri. Philpot *v.* Mo. Pac. R. Co. (Mo.). 323.

Passenger thrown from car by other passengers, company not liable. Feltoa *v.* Chicago, etc., R. Co. (Iowa). 229.

Plaintiff must show that she has no means of support except what her husband furnished her, as tending to prove that his death had caused her a pecuniary loss. Annes *v.* Milwaukee, etc., R. Co. (Wis.). 102.

Section 2121 of Revised Statutes of Missouri is both penal and compensatory, and the emancipation of a minor son by his parents is no defence to an action thereon by them for his death. Philpot *v.* Mo. Pac. R. Co. (Mo.). 323.

The right of action given by Revised Statutes of Missouri, section 2121, for the death of a person occurring in that State by reason of the negligent act of a railroad, is not limited to residents of that State. Philpot *v.* Mo. Pac. R. Co. (Mo.). 323.

DEMURRER.

An exception to the general rule, that a complaint, to withstand a demurrer, must state a cause of action in favor of all the plaintiffs, occurs when the plaintiffs are husband and wife, and the action relates to injuries to the person or character of the latter; for the husband is a proper although not a necessary party. Ohio, etc., R. Co. *v.* Cosby (Ind.). 339.

To evidence overruled in case presenting peculiar facts. Coudy *v.* St. Louis R. Co. (Mo.). 282.

DERAILMENT.

See NEGLIGENCE.

Defective track. Evidence as to condition of road. 299 *n.*

Frost: derailment occasioned by rails broken from. 290 *n.*

DISCRIMINATION.

See RATES.

Generally. 12 *n.*

EMANCIPATED MINOR CHILD.

See MINOR.

EMINENT DOMAIN.

See APPEAL; NUISANCE.

Abandonment. Companies' liability for loss to landowner by reason of. 440 *n.*

—— Compensation of landowner. Where the act incorporating a railway company contains a clause in the usual form that in case of the abandonment of the railway the parliamentary deposit shall be applicable towards compensating any landowners whose property may have been interfered with or rendered less valuable by the commencement, construction, or abandonment of the railway, a landowner can, as a general rule, only claim compensation on account of acts done or omitted to be done by the company under their statutory powers, and not on account of any collateral obligation entered into by the company. But *held*, by Cotton and Lindley, L. JJ. (dissentiente Lopes, L. J.), that where a company has entered into a collateral obligation of such a nature that the breach of the obligation is necessarily involved in the abandonment of the railway and undistinguishable from it, such as a covenant to build a station, the breach of such obligation may be taken into account in assessing the diminution of value of the land. *Held*, also, that a covenant to put up fences on the land taken by the company was not such an obligation as could form the subject of a claim for compensation out of the deposit. *In re* Ruthin, etc., Act (Eng.). 434.

Assessment of commissioners: when time for taking appeal from, begins to run. 415 *n.*

Award. Appeal. Payment: effect of. Where a railroad company appropriates land for its right of way, and the appraisers award damages to the owner of the land, from which award an appeal is taken to the proper court, the payment to the clerk of the damages awarded by the appraisers will operate only as a license to the railroad company to take possession of the land so appropriated; and the title to such land will not vest in such railroad company until it has fully paid the damages finally assessed and adjudged in favor of such owner upon the final determination of such appeal by the proper court. Terre Haute, etc., R. Co. *v.* Crawford (Ind.). 369.

Commissioners' report: when it will be set aside. 418 *n.*

Commissioners to appraise damage, motion to discharge them, for refusing to follow directions of court as to estimating damages, etc., refused. *In re* Petition *v.* Bennett (N. Y.). 404.

Contract as to appraisal of award construed. *In re* Petition, etc., *v.* Bennett (N. Y.). 404.

Cost of filling landowner's land adjacent to right of way as an element of damage. Terre Haute, etc., R. Co. *v.* Crawford (Ind.). 369.

Damages: measure of. 434 *n.*

Damages: owner at time track is laid can alone recover; a subsequent vendee cannot. 424 *n.*

Damages to property: decrease of rental value competent evidence to show. 408 *n.*

Damages. Value of land. Subsequent vendee. The claim for damages and that for the value of the land taken may be distinct. Damages for injury to land belong to the owner at the time of the injury, and do not pass to a subsequent vendee, who is presumed to have paid only the market

EMINENT DOMAIN—*Continued.*

value of the land at the time he bought it. Wabash, etc., R. Co. *v.* McDougal (Ill.). 886.

Extent of company's freedom to use land already taken for railway purposes. 866 *n.*

Fee. Purpose. A railroad company taking land by virtue of its right of eminent domain does not acquire the fee, but only an easement, and cannot permanently use it for a different purpose from that for which it was taken. Ross *v.* Pennsylvania R. Co. (Pa.). 867.

Future use: condemnation of land for. 852 *n.*

Interest. A landowner is entitled to interest on the whole sum assessed by the jury as compensation for a right of way condemned by railroad company from the date of the filing of award by commissioners. Seefeld *v.* Chicago, etc., R. Co. (Wis.). 428.

Interest on award. Where premises sought to be condemned for railroad purposes have been vacated by the tenant, have remained unoccupied, and no rent, accruing after the date of the filing of the award, has been received by the owner thereof, the sum awarded as damages bears interest from the date of such filing while an appeal from the award is pending, even though the company have paid the money into court, and have not taken possession. Uninacke *v.* Chicago, etc., R. Co. (Wis.). 424.

Interference with use. Rights of owner. Where a railroad company occupied a portion of the land appropriated to its use for depot and station purposes, the manner of its use for these purposes is in its discretion; and it is in concern of the owner of the fee. Even if it exceeds its franchise in the manner of such occupancy, it does not thereby disseize the owner of the fee, nor authorize an action for trespass by him, nor justify a demand for damages for rents and profits for such use and occupation. Pierce *v.* Boston, etc., R. Co. (Mass.). 359.

—— Where a railroad is in possession of premises appropriated to its use in the exercise of a public franchise, the owner of the fee of the land appropriated has no right to interfere so long as the use is continued for the purposes of the franchise. Pierce *v.* Boston, etc., R. Co. (Mass.). 359.

Interference with wrongful use. It is not until it substitues another use for that given by its franchise, so that its possession of the land is wrongful, that its occupation can be referred to the claim of the freehold. Pierce *v.* Boston, etc., R. Co. (Mass.). 359.

Location of line. Statutes. Sections 2, 3, sub-section 1, c. 1, Minnesota Laws, 1857, Ex. Sess., authorized the St. Paul, M. & M. R. Co. to change the location of its line after it should have been located and constructed, and to exercise the power of eminent domain to obtain land for the right of way so located. The act of 1862 (chap. 20, Sp. Laws, 1862), specified the times within which specified portions of the road should be built. *Held* that this act related only to the first or original locating and constructing it, and did not affect such authority. Hewitt *v.* St. Paul, etc., R. Co. (Minn.). 342.

New company's obligation. A new railroad corporation succeeded to the property, rights, and franchises of an older company. It entered upon land appropriated by its predecessor, and continuously used the same for railroad purposes to the exclusion of the landowner. The value of the land had been determined in the original proceedings by the judgment of a court of competent jurisdiction. *Held*, that the new company is deemed to have adopted the original appropriation, and is, in equity, liable therefor, and it cannot escape such liability by afterwards abandoning the land. Lake Erie, etc., R. Co. *v.* Griffin (Mass.). 394.

Noise, smoke, etc., as elements of damage. 886 *n.*

Notice. Reading at trial. In a controversy between a railroad company and an owner of land respecting the damages sustained by the owner for the right of way proposed to be taken, the owner cannot have read, on the trial, the notice of appeal of the railroad company, in which the sum

EMINENT DOMAIN—*Continued.*

awarded him by commissioners is stated. Seefeld *v.* Chicago, etc., R. (Wis.). 428.

Owner at time land is taken can alone recover damages. 392 *n.*

Present necessity. The mere fact that the land proposed to be taken for a public use is not needed for the present and immediate purposes of the petitioning party is not necessarily a defence to a proceeding to condemn it. *In re* Application, etc., (N. Y.). 348.

Present use. Foreign company. Where such use is not required for the purpose of the local traffic of the petitioning railroad company, but for the purpose of enabling it to fulfil the obligations of a contract made with a foreign railroad company, whereby it has bound itself to furnish to such company accommodations over its road, the object for which the land is sought will be deemed a public use. *In re* Application, etc., (N. Y.). 348.

Public "levee" may be taken. An action was brought by the plaintiff company against the city of Portland, under an act of the legislature of Oregon, to condemn what is known as the "Public Levee," in the city of Portland, to its use for a depot and other purposes. The levee had been unconditionally dedicated to the public use, as a public landing. *Held*, that the things authorized to be done under the act were not inconsistent with the use of the levee as a public landing, and hence the legislature had the power to regulate its use, or devolve it upon the defendant or the plaintiff, as its agent, in conformity with the purposes of its dedication, without the consent of the city, and without compensation to it. Portland, etc., R. Co. *v.* Portland (Oregon). 353.

Public use: condemnation of land already devoted to. 359 *n.*

Renting condemned land. A reasonable time to be determined by all attending circumstances, must, however, be allowed; and, pending appeal from condemnation proceedings, the railroad may rent the premises, and the owner of the fee will not be entitled to mesne profits. Ross *v.* Penna. R. Co. (Pa.). 367.

Sale of railway and franchise: effect on condemnation proceedings. 402 *n.*

Statutory authority. Presumptions. It cannot be presumed, from a general grant of authority, that the legislature intended to authorize acts to the injury of third persons, where no compensation is provided except upon condition of obtaining their consent. The construction applies with peculiar force to grants of corporate powers to private corporations, which are set up as a justification for acts to the detriment of private property. Cogswell *v.* New York, etc., R. Co. (N. Y.). 376.

—— The statutory sanction which will justify an injury to private property must be express, or must be given by clear and unquestionable implication from the powers expressly conferred, so that it can fairly be said that the legislature contemplated the doing of the very act which occasioned the injury. Cogswell *v.* New York, etc., R. Co. (N. Y.). 376.

Subsequent vendee: increase of damages. For any increase of damage which results to the land from any alteration in the embankment of the railroad after such purchase, the vendee is entitled to recover, and may do this in a proceeding to condemn the land bought by the railroad company, without being put to an independent action. Wabash, etc., R. Co. *v.* McDougal (Ill.). 386.

Taking land against will of owner. 46 Vic., ch. 64 (D.), which empowered the company to hold and own land in any municipality through or in which the main line or any branch was carried for the erection and maintenance thereon of stations, sidings, etc., as might be necessary for the purposes of the company, did not empower them to expropriate against the will of the owner. Murphy *v.* Kingston, etc., R. Co. (Ont.). 344.

Taking land outside of map. A railway company after the completion of its line sought to expropriate a piece of land not marked or referred to on any map or plan filed, or book of reference made by the company, but within one mile's distance of the terminus of the railway, as delineated

EMINENT DOMAIN—*Continued.*

on the filed plan, for the purpose of better utilizing a certain other property previously acquired by them as a passenger and freight station. *Held*, that, under 42 Vic., ch. 9, sec. 8, sub-s. 11 (D.), this was not permissible, there being no provisions affecting the matter in the special acts of the company. Murphy *v.* Kingston, etc., R. Co. (Ont.). 344.

Title. Admission. In proceedings to condemn a right of way for a railroad the title of one named in the petition as respondent to the land sought to be taken is admitted unless it is expressly denied, and the averment by respondent of title to property not covered by the petition will entitle him to damages in respect thereto, if such averment is not denied. Golden Boulder, etc., R. Co. *v.* Haggart (Col.). 375.

Use of land while appeal is pending from damages assessed: right of company to. 368 *n.*

View by jury. In an action to condemn lands by a railroad company for a right of way, the office of a view is to enable the jury to determine the weight of conflicting testimony respecting value and damage. Seefeld *v.* Chicago, etc., R. Co. (Wis.) 428.

View of the premises in condemnation proceedings office of. 431 *n.*

Trespass: action of, against railroad company; measure of damages; value of adjacent land; possession of plaintiff. 434 *n.*

EVIDENCE.

See COMMON CARRIER; HUSBAND AND WIFE; PASSENGER.

Admission of declaration of servants. 289 *n.*

Commissioner is a competent witness to show when an assessment of damages was actually made. Jamisson *v.* Burlington, etc., R. Co. (Iowa). 413.

Commission to take testimony. Validity. The validity of the execution of a commission to take testimony is not affected by the fact that the commissioner signs himself throughout as a notary public merely, except across the seal of the envelope in which he returns the testimony. Delaware, etc., Co. *v.* Webster (Pa.). 160.

Credibility of witnesses is to be determined by the jury. Coudy *v.* St. Louis, etc., R. Co. (Mo.). 283.

Damages. Opinion of plaintiff. Plaintiff being introduced as a witness in her own behalf, should not be allowed to state how much, in her opinion, was her loss by her inability to labor. The witness cannot give an opinion as to the amount of the damages, but must state facts, and let the jury say from the facts what is the amount of the damages. Central R. Co. *v.* Senn (Ga.). 304.

Declaration of engineer of locomotive of a train which meets with an accident, as to the speed at which the train was running when the accident happened, made between ten and thirty minutes after the accident occurred, is not admissible in evidence against the company in an action by a passenger on the train to recover damages for injuries caused by the accident. Vicksburg, etc., R. Co. *v.* O'Brien (U. S. S. C.). 282.

Decrease of rental value competent to show damage to property in condemnation proceedings. 403 *n.*

Defendant cannot make its own instructions to its conductors a matter of defence by asking one as to the practice in reference to stopping the cars at the request of a passenger, and also as to the instructions which he had received as conductor. President *v.* Leonhardt (Md.). 194.

Depositions. Indorsement by postmaster. Where the statute provides that when depositions are sent by mail "the postmaster or his deputy mailing the same shall indorse thereon that he received them from the hands of the officer before whom they were taken," an indorsement on a deposition as follows: "Received this package from the hands of W. W. Gray, clerk, the officer before whom the deposition was taken. (Signed) G. S.

EVIDENCE—*Continued.*

Smith, P. M." is sufficient. Central Texas, etc., R. Co. *v.* Hancock (Tex.). 325.

Depositions. Name of party changed. Suppression. Where an action was brought against "the Central R. and Banking Co.," and interrogatories were taken out, crossed and executed, the name of the defendant being so stated in them, and subsequently the declaration was amended by inserting after the name of the defendant the words "of Georgia, lessees of the Southwestern R. Co.," the interrogatories previously executed were not thereby rendered inadmissible. Central R. Co. *v.* Sanders (Ga.). 300.

Depositions. Suppression. Waiver. Whether interrogatories should have been suppressed or not, if the question of the amount of damages, to which alone they related, is waived, the ruling of the court as to the interrogatories is immaterial. Central R. Co. *v.* Sanders (Ga.). 300.

Derailment from defective track. Admission of evidence as to condition of road. 299 *n.*

Disability of corporation. Corporation being a collection of individuals, acting through its officers and agents, who are admitted to testify in cases where the corporation is a party, cannot be said to be under legal disability, and the opposing party in a suit can be examined as a witness. North Hudson Co. R. Co. *v.* May (N. J.). 152.

Error in admitting, cannot be claimed for the first time in the Supreme Court. Terre Haute, etc., R. Co. *v.* Crawford (Ind.). 869.

Examination of person's injury. Reversal. Though the right to have an examination made of one who sues to recover damages for permanent injuries to his person, in order that their extent may be known, and to have it done by skilled persons under order of the court, has been maintained, when shown to be necessary to further the ends of justice; yet a cause will not be reversed for a refusal to order such an examination made, in the absence of a showing that it was necessary to a full presentation of all the facts, and where it was not shown that the plaintiff was unwilling to submit to an examination by any competent person. International, etc., R. Co. *v.* Underwood (Tex.). 240.

Examination of the person in cases of personal injury by order of the court. 245 *n.*

Expert. Impeaching by cross-examining. In proceedings to condemn land for a railroad, an expert witness may, for the purpose of impeaching his competency as an expert, be cross-examined as to the value of other real estate in the vicinity, without showing that the same was similar in character and value to the condemned property, and he may also be asked if he was not aware that several lots—part of such real estate—had been sold at sums greatly in excess of his estimate of their value. Uniacke *v.* Chicago, etc., R. Co. (Wis.). 424.

General condition of track. In an action against a railroad corporation by a passenger, for a personal injury caused by a car being thrown off the track in consequence of a worn-out rail, the admission of evidence that the general condition of that portion of the road which included the place of the accident had long been bad, and that the rails had been in use a great many years, affords the defendant no ground of exception. Vicksburg, etc., R. Co. *v.* Putnam (U. S. S. C.). 291.

Grade. Cinders. Evidence that there was a point on the defendant's road over which the train on which the plaintiff was riding passed, where there was a grade of two hundred and ninety feet to the mile, and that, in ascending it, the engine emitted steam and cinders in greater quantities, and with much more force, than when passing over other portions of the road, was inadmissible, where it was not pertinent to any issue made by the pleadings; and especially so where there was no allegation or offer to prove that it was a scale or cinder emitted in this locality which struck the plaintiff in the eye, and occasioned the injury for which this suit was brought. Higgins *v.* Cherokee R. Co. (Ga.). 218.

EVIDENCE—*Continued.*

Husband cannot testify where wife is interested and party to suit. 338 *n.*

In civil cases, sufficiency of, general rule. Louisville, etc., R. Co. *v.* Thompson (Ind.). 329.

Larceny is a *crimen falsi*, and the record of a conviction for larceny is admissible to discredit a witness. Georgia R. Co. *v.* Homer (Ga.). 186.

Mechanic's evidence as to what contrivance would have rendered car safe is admissible. President *v.* Leonhardt (Md.). 194.

Non-expert's opinion as to cost of filling land admissible. Terre Haute, etc., R. Co. *v.* Crawford (Ind.). 369.

Opinion. Any witness may give an opinion as to what caused the train to run off the track, provided the witness states the reasons upon which the opinion is predicated. One who is an expert may give an opinion without stating his reasons. Central R. Co. *v.* Senn (Ga.). 304.

Opinion evidence as to amount of damage not admissible. 309 *n.*

Opinion. It is not reversible error for a non-expert witness, who testifies to the facts in a case, to give an opinion based upon such facts. Straus *v.* Kansas, etc., R. Co. (Mo.). 170.

—— Rule. It is a general rule that, wherever an expert can give an opinion without the reasons upon which it is based, any other witness, who knows facts upon which he can form an opinion, may state his opinion, by giving the facts upon which he bases it. Central R. Co. *v.* Senn (Ga.). 304.

Rate of speed. In an action by a passenger against a railroad company to recover for injuries resulting from the breaking down of a bridge, it is competent to prove the rate of speed at which the train ran upon the bridge. Louisville etc., R. Co. *v.* Pedigo (Ind.). 310.

Records of conveyances of other lots in the vicinity are inadmissible on behalf of a landowner to prove the value of land sought to be condemned by a railroad company for a right of way. Seefeld *v.* Chicago, etc., R. Co. (Wis.). 428.

Release. At the trial of a petition to assess damages for land taken by a railroad company, a release executed to one who owned only a part of the land which is the subject of the petition is inadmissible against the petitioners, who do not claim under such release. Cushing *v.* Nantasket B. R. Co. (Mass.). 392.

Reports admissible. The official reports of the superintendent of a railroad to the board of directors are competent evidence, as against the corporation, of the condition of the road. Vicksburg, etc., R. Co. *v.* Putnam (U. S. S. C.). 291.

Report of U. S. engineer. At the trial of a petition to assess damages for land taken for railroad purposes, it was attempted to introduce in evidence a printed document of the United States Senate, containing a report of one of the corps of United States engineers who made the survey of the railroad, for the purpose of showing that the building of the road was a benefit to the land of the petitioners, which should be taken into consideration in estimating the damages. *Held*, that such document is inadmissible. Cushing *v.* Nantasket B. R. Co. (Mass.). 392.

Similar previous accidents. On the question of the negligence imputed to the defendant, the testimony of a witness familiar with the management, use, and construction of steam locomotive engines, "that he never heard of any accident to persons from sparks emitted from the smoke-stack, either before or since" the one then under investigation, was pertinent and material. Higgins *v.* Cherokee R. Co. (Ga.). 218.

Statement of conductor. The written statement made by the conductor of the car, in the line of his duty, giving details of the accident immediately after it happened, was not admissible in evidence, but the fact must be proved by the conductor or others who witnessed the occurrence, although if the conductor be sworn he may use the written statement to refresh his memory. North Hudson Co. R. Co. *v.* May (N. J.). 151.

Tables of mortality. In an action against a corporation by a passenger, for

EVIDENCE—*Continued.*

personal injuries impairing his capacity to earn his livelihood, standard life and annuity tables are competent evidence for the consideration of the jury, but not absolute guides to control their decision. Vicksburg, etc., *v.* Putnam (U. S. S. C.). 291.

Question asked the driver of the car, whether, "according to the best of his recollection, he had on the day of the accident observed his practice of bringing his horses to a walk in crossing the bridge," when he had already testified that "he had no recollection on the subject, except that it was his practice to go over the bridge carefully and slow," properly *held* inadmissible. President *v.* Leonhardt (Md.). 194.

Variance. Under complaint for non-delivery of goods by carrier a recovery cannot be had on proof that they were delivered in a damaged condition. South, etc., R. Co. *v.* Wilson (Ala.). 41.

Whether an accident had ever happened before to a passenger is not relevant. President *v.* Leonhardt (Md.). 194.

Widow of decedent is a competent witness. Louisville, etc., R. Co. *v.* Thompson (Ind.). 329.

Written statement of physician. In an action against a railroad company by a passenger to recover for injuries, a written statement as to the nature and extent of his injuries made by his physician while treating him for them, for the purpose of giving information to others in regard to them, is not admissible in evidence against the company, even when attached to a deposition of the physician in which he swears that it was written by him, and that in his opinion it correctly states the condition of the patient at the time referred to. Vicksburg, etc., R. Co. *v.* O'Brien (U. S. S. C.). 282.

EXPRESS COMPANIES.

Facilities for express business not demandable by all alike, as of right. Pfister *v.* Central Pac. R. Co. (Cal.). 246.

FREIGHT.

Baggage: passenger carrying money as, may be compelled to pay. 256 *n.*

FROST.

See DERAILMENT.

HUSBAND AND WIFE.

See DAMAGES; DEMURRER; EVIDENCE.

Action by husband and wife for injuries to wife. 342 *n.*

Competency of wife as witness. The second section of the Virginia Act of April 4, 1877, providing that "All real and personal estate hereafter acquired by any married woman, whether by gift, grant, or purchase, inheritance, devise or bequest, shall be and continue her sole and separate estate," etc., does not include the damages recovered in an action for a tort on the wife's person; and hence on a joint action by a husband and wife against a common carrier for injuries inflicted upon the wife by the negligence of the defendant company, the husband has a legal interest in the suit and the wife's common-law disability as a witness attache, and she is not a competent witness in the case. Norfolk, etc., R. Co. *v.* Prindle (Va.). 332.

Must join in action for loss of time resulting from an injury to the wife. Nichols *v.* Dubuque, etc., R. Co. (Iowa). 188.

INJUNCTION.

See NUISANCE.

INSTRUCTION.

Abandoning claim for exemplary damages. See ABANDONMENT.

Damages. Error. In an action against a railroad company for damages to the plaintiff, caused by the car upon which she was a passenger running off the track, and where damages are claimed, both for physical pain and suffering from wounds received by her, and also on account of loss of business and inability to labor, it is error for the court to charge the jury in the following language, without any qualification: "In some torts the entire injury is to the peace, happiness and feelings of the plaintiff. In such cases, no measure of damages can be prescribed, except the enlightened conscience of impartial jurors." Central R. Co. *v.* Senn (Ga.). 304.

Erroneous charge furnishes no ground for reversal to the party in whose favor it is given. Partee *v.* Georgia R. Co. (Ga.). 12.

Exemplary damages: charge as to. When a petition claims exemplary damages for an alleged wrong, and a question exists as to whether the evidence shows such facts as will sustain the claim, a charge should be given on that subject unless, in consequence of an oral statement made in court, the court by a charge withdraws the consideration of such claim for exemplary damages from the jury. International, etc., R. Co. *v.* Underwood (Tex.). 240.

Federal courts. Opinion of judge. Review. At a trial by jury in a court of the United States, the judge may express his opinion upon the facts; the expression of such an opinion, when no rule of law is incorrectly stated, and all matters of fact are ultimately submitted to the determination of the jury, cannot be reviewed by writ of error; and the powers of the courts of the United States in this respect are not controlled by State statutes forbidding judges to express any opinion upon the facts. Vicksburg, etc., R. Co. *v.* Putnam (U. S. S. C.). 291.

General rule. The charge of the court should always be so framed as to present to the jury the issues made by the pleadings, if there be evidence under them, unless an issue be abandoned, concerning which abandonment the jury should be instructed. International, etc., R. Co. *v.* Underwood (Tex.). 240.

It is the duty of the court, in every case in which a general verdict is to be rendered, to instruct the jury as to the force and legal effect of the facts proved within the issues. Woolery *v.* Louisville, etc., R. Co. (Ind.). 210.

Judgment will not be reversed because of an erroneous instruction when it affirmatively appears, from answers to interrogatories, that the instruction complained of was not influential in determining the verdict. Woolery *v.* Louisville, etc., R. Co. (Ind.). 210.

Misstatement of law made by mistake and not in ignorance of law and followed by a correct statement of the law, *held* not a prejudicial error. Annes *v.* Milwaukee, etc., R. Co. (Wis.). 102.

Proximate cause. A charge which, as far as it goes, gives the law, is not objectionable upon the ground of not setting forth with sufficient fulness the conditions under which the verdict should be for defendant, or upon the ground of not entering sufficiently into the particulars which distinguish remote from proximate causes, if special charges are not asked for upon these matters. International, etc., R. Co. *v.* Smith (Tex.). 148.

That no power on earth can set aside verdict of jury if made under the circumstances stated not error. Georgia R. Co. *v.* Homer (Ga.). 186.

INTEREST.

See EMINENT DOMAIN.

JUDGMENT.

Non obstante veredicto to be rendered where the general verdict is in conflict with the special findings. Feltoa *v.* Chicago, etc., R. Co. (Iowa). 229.

INTERSTATE COMMERCE.

Interstate tariffs not subject to regulation by State railroad commissioners. State *v.* Chicago & Northwestern R. Co. (Ia.). 15.

JURY.

Remarks to, by counsel. What may be commented on. 328 *n.*
Special interrogatories to. It is not error to reject interrogatories addressed to a jury which seek to elicit a conclusion of law. Louisville, etc., R. Co. *v.* Pedigo (Ind.). 310.

LANDLORD AND TENANT.

Railway company's right to rent land condemned. Ross *v.* Penna. R. Co. (Pa.). 367.

LARCENY.

See TICKETS.

LIEN.

See COMMON CARRIER.

MASTER AND SERVANT.

Evidence. Admission of declaration of servants. 289 *n.*

MINORS.

See DEATH.

Emancipated minor child: right to recover damages for death of. 325 *n.*
Rights of children on train in charge of parents. 193 *n.*

MONEY.

See BAGGAGE.

NEGLIGENCE.

See PASSENGER.

As to proximate causes, see International, etc., R. Co. *v.* Smith (Tex.). 148.
Bridges: negligence in the construction of. 314 *n.*
Contributory. The right of a person to recover damages for a personal injury is not affected by his having contributed to it, unless he was in fault in so doing. One who, through the negligence or fault of another, is put in a position of immediate danger, is not bound to exercise all the prudence and care that ordinarily characterizes the conduct of a prudent man; he has no right, however, upon the happening of some occurrence such as would not create fear or apprehension of injury in the mind of an ordinarily prudent and careful person, to bring injury upon himself and then recover damages by reason of it. South Cov., etc., R. Co. *v.* Ware (Ky.). 206.
Degree of care imposed upon railroad company as to track and machinery. 318 *n.*
Derailment: accident by. Hipsley *v.* Kans., etc., R. Co. (Mo.). 288.

NEGLIGENCE—*Continued.*

Fact of injury raises presumption of. Louisville, etc., R. Co. *v.* Thompson (Ind.). 88.

Facts showing. It appeared in this case that the company did not have a suitable track; that the outside of the curve where the accident occurred was lower lower than the inside; and that the train was behind time and was running rapidly to catch up when the train left the track, causing the injury sued for. A verdict for the plaintiff was, therefore, not without evidence of negligence to support it. Central R. Co. *v.* Sanders (Ga.). 300.

Falling upon track by accident. Injury. Company liable. International, etc., R. Co. *v.* Ormond (Tex.). 140.

Hand-car injury. Signals. The plaintiffs were on a hand-car on the defendant road with the permission of the company. The car was in the regular performance of its duty, and was rightfully on the track. A regular train on the road was behind time. It had just passed a road-crossing without sounding the whistle as it was required to do by law, and was nearing a bridge and trestle-work where, by the rules of the company, it was required to moderate its speed to four miles an hour, yet on this occasion it was running at the rate of twenty miles an hour. After crossing the road it ran into a cut where the track made a sharp curve, and collided with the hand-car, which was but a short distance from the crossing, and produced the injuries of which the plaintiffs complain. It was conceded that there was negligence in the operation of the train by the defendants, but it was contended that the plaintiffs could not recover, for the reason that they were guilty of contributory negligence in not sending out flagmen as was required by the regulations of the company where the presence of the car in a curve placed it in a dangerous position. *Held*, that as the hand-car would have been in no danger from the over-due train had the signals been given at the road crossing, and the speed of the train slackened as required by the regulations, those upon the hand-car had a right to rely upon the performance of their duty by the employees on the train, and were not guilty of negligence contributing proximately to the injuries received. International, etc., R. Co. *v.* Gray (Tex.). 318.

Jury must determine. International, etc., R. Co. *v.* Ormond (Tex.). 140.

Must be averred, or facts must be stated showing it. Pennsylvania Co. *v.* Marion (Ind.). 132.

Release of liability. Contract by Grand Trunk R. Co. in Canada, relieving it from liability for negligent injury of animals carried by it *held* illegal. Grand Trunk R. Co. *v.* Vogel (Can.). 18.

Several injuries. Instruction. In an action for damages against a railway company, the plaintiff alleged several specified injuries. The court instructed the jury to the effect that if they found that one specified injury was not caused or aggravated by the accident, then they should find for the defendant. *Held* an erroneous instruction, although in other instructions the jury were told that if they found for the plaintiff they should award damages sufficient to compensate him for all the injuries received. Moore *v.* Des Moines, etc., R. Co. (Iowa). 315.

That city located tracks no defence against injured passenger. President *v.* Leonhardt (Md.). 194.

NEW TRIAL.

See PRACTICE.

When a question objected to but allowed elicits nothing material and nothing to the prejudice of the party complaining, this is not ground for a new trial. McGowan *v.* Wilmington, etc., R. Co. (N. C.). 64.

NOISE AND SMOKE.

See EMINENT DOMAIN; NUISANCE.

NUISANCE.

Engine-house. An engine-house erected by a railroad company adjacent to plaintiff's dwelling-house, and so used as practically to deprive plaintiff of the use of the house as a residence, and by filling it with smoke and dust, and corrupting and tainting the air with offensive gases, makes life therein uncomfortable and unsafe, is a palpable nuisance, for which an action for damages will lie, and a court of equity will enjoin the same. Cogswell *v.* New York, etc., R. Co. (N. Y.). 375.

Subsequent vendee's right to recover damages. The plaintiff purchased certain property near the defendant railroad after it was built and in operation. He subsequently brought an action against the company to recover damages sustained from the operation of the road by throwing smoke, cinders, and ashes upon his premises. *Held*, that there can be but one response in damages on the part of a railroad company for land taken or injured by it under the law of eminent domain, and as the original owner of the property claimed to have been damaged could have sued and recovered for the depreciation of the value of the property, the right of action is in him for all damages that may have been or may be caused by the operation of the road, and there is no right of recovery in his alienee. Chicago, etc., R. Co. *v.* Loeb (Ill.). 415.

ONUS PROBANDI.

On defendant to disprove negligence. President *v.* Leonhardt (Md.). 194.

Presumption of negligence in case of injury. 287 *n.*

Prima-facie case. Rebuttal. Where one is injured by the running of a car and engine of a railroad company, the law presumes that such injury was the result of negligence on the part of the company, and to relieve itself of such presumption, it must show that it used all ordinary care and diligence to prevent the injury. It is not enough for them to insist that they do not know how the accident occurred, and that it is impossible for them to find out. Central R. Co. *v.* Sanders (Ga.). 800.

—— When plaintiff gives evidence tending to prove that he was a passenger on defendant's train, and that he was injured by the derailment of the train, without any fault on his part, he makes out a *prima-facie* case entitling him to a verdict, unless it is rebutted and overcome by evidence of defendant showiug that the accident was not caused by its want of care and negligence. Hipsley *v.* Kans. City, etc., R. Co. (Mo.). 287.

—— Non-suit. Evidence in such case on the part of defendant that the train was derailed by the breaking of a sound, well-spiked rail; that the ties were good, sound oak ties, and the road-bed straight and well ballasted; that the train was at proper speed; that the break was a fresh break and disclosed neither flaw nor defect in the broken rail, but was the result of frost; that sound iron and steel rails would break from frost, and there was no way to prevent it, is not sufficient to justify a nonsuit. Hipsley *v.* Kans. City, etc., R. Co. (Mo.). 287.

PARTIES.

See HUSBAND AND WIFE.

PARTNERSHIP.

The sale of a through ticket over the route formed by the connecting lines of several railroad companies, and the checking of baggage to the end of the route, without other evidence of the relations between the companies, or the basis upon which through business was done by them, fails to show such a community of interest as would make them partners *inter sese*, or as to third persons; nor will such action alone make the last carrier liable for the negligence of the contracting carrier, or of any other carrier in the combination. Atchison, etc., R. Co. *v.* Roach. 258.

PASSENGER.

See BAGGAGE; COMMON CARRIER; EVIDENCE; PARTNERSHIP; STATION; TICKETS.

Alighting from moving car. It is not negligence, *per se*, for a passenger to get off a car that is moving slowly, in response to an invitation by a person in charge of the train. But if the train is moving so rapidly as to render it clearly dangerous to attempt to get off, the passenger who does get off is negligent. When there is doubt whether the speed of the train was so rapid as to render it clearly dangerous to get off, the fact is for the jury. Delaware, etc., Co. *v.* Webster (Penn.). 160 *n.*

Alighting from moving train. 169 *n.*

Alighting from train. 115 *n.* 186 *n.*

—— Injury. Evidence *held* admissible to show that others had previously been directed to take that car, and in alighting from it as plaintiff did had been injured. Bullard *v.* Boston, etc., R. Co. (N. H.). 117.

—— Plaintiff received personal injuries caused by the defendant railway company not providing a proper place for passengers to alight from its trains and not drawing the car in which plaintiff was riding up to the station platform, so that in stepping from the car to the ground she fell and hurt herself. The jury was instructed that "If in the exercise of ordinary care the plaintiff might have safely gained the platform as by passing through the car forward, and she elected to take the risk of alighting where she did instead of taking the safe course, she was guilty of negligence, and could not recover." The evidence showed that she could have stepped from the train to the platform by passing through the car in front of that in which she was riding. *Held* verdict for defendant must be rendered. Eckerd *v.* Chicago, etc., R. Co. (Ia.). 114.

Alighting. Ice on step. The plaintiff, while alighting from one of the defendant's cars, and carrying a child on her left arm, tried to reach with her right hand the handle of the rear dasher. But as another passenger, though there were empty seats in the car, was standing in the way, she missed the handle, and, slipping on ice which remained on the step, from the previous day, fell and received severe injuries. *Held*, that the evidence made out a case for a jury; and a nonsuit was error, although it appeared that the plaintiff knew there was ice on the step, and might, by changing the child to the other arm, have grasped with her left hand the handle on the end of the car. Neslie *v.* Second, etc., R. Co. (Pa.). 180.

Alighting. Injury. Customary time of stopping inadmissible. Nichols *v.* Dubuque, etc., R. Co. (Iowa). 188.

Assaults upon passengers: liability of company for. 231 *n.*

Baggage. Injury to passenger while unloading. Whether the deceased had a receipt, bill of lading, or check for his goods, which rendered it unnecessary for him to go to the baggage car after he had been safely delivered at his destination, and whether it was proper, under all the circumstances of the case, for him to enter the car containing his effects, and see in person to their being unloaded, it was the province of the jury to determine. International, etc., R. Co. *v.* Ormond (Tex.). 139.

Baggage: passenger carrying money as, may be compelled to pay freight. 256 *n.*

Boarding moving elevated car. The deceased was well acquainted with the defendant's station and its surroundings, and the manner of operating the trains. He endeavored, together with two other persons, to board an elevated-railway train after it had begun to move from the station. The two other persons, who were slightly in advance of deceased, either pushed back the car-platform gate or it was drawn back for them by the conductor, the gate having either been closed or was then being closed by the conductor, and succeeded in boarding the train. Deceased took hold of the stanchions of the car, placed one foot on the platform, and was in the act of passing on to the car, when the conductor closed the gate, and deceased,

PASSENGER—*Continued.*

clinging to the car, was carried a few feet until he came in contact with a projection from the station platform, and received injuries from which he died. In an action to recover damages for the death of plaintiff's intestate, it was held that deceased was guilty of contributory negligencce and that a nonsuit was properly directed. Solomon *v.* Manhattan R. Co., (N. Y.). 155.

Boarding moving train. Presumption. The presumption of negligence in the case of one attempting to board a moving train is stronger even than in the case of one attempting to alight from a moving train. Solomon *v.* Manhattan R. Co. (N. Y.). 155.

Bridges: negligence in the construction of. 314 *n.*

Contract for "through" transportation. Evidence. The sale of a through ticket, for a single fare, by a railroad company, to a point on a connecting line, together with the checking of the baggage through to the destination, is evidence tending to show an undertaking to carry the passenger and baggage the whole distance, and which, in the absence of other conditions or limitations, and of all other circumstances, will make such carrier liable for faithful performance, and for all loss on connecting lines, the same as on its own. Atchison, etc., R. Co. *v.* Roach. 257.

Damages: opinion evidence as to amount of, not admissible. 309 *n.*

Degree of practical care and skill required of railroad companies in the carriage of passengers extends to roadbed, bridges, track, and machinery. Louisville, etc., R. Co. *v.* Thompson (Ind.). 88.

Derailment from defective track. Evidence as to condition of road. 299 *n.*

Derailment occasioned by rails broken by frost. 290 *n.*

Emancipated minor child: right to recover damages for death of. 325 *n.*

Evidence. Admission of declaration of servants. 289 *n.*

Examination of the person in cases of personal injury by order of the court. 245 *n.*

Expulsion. Illegal ejection of a passenger entitled by contract to be carried over a railway is itself an act for which damages are recoverable. The measure is for the jury. Georgia R. Co. *v.* Homer (Ga.). 186.

Expulsion of child. Where a child of nine years of age enters a passenger train with her mother, who has provided herself with a ticket, the child is a passenger, whether the contract of carriage, if any, is made with her or with her mother, and as such she is not entitled to be carried unless paid for. Beckwith *v.* Cheshire R. Co. (Mass.). 192.

Expulsion of passenger for failing to procure ticket before getting on train. Everett *v.* Chicago, etc., R. Co. (Ia.). 98.

Expulsion. Presumption. In case of the ejection from a railroad train of a passenger who had previously delivered up his ticket, and who sues for damages on account of such ejection, the presumption is against the company; and it devolves on it to show that the conductor, who put the passenger off, acted rightly and under authority of law, and thus to lift the burden cast upon it by law. Georgia R. Co. *v.* Homer (Ga.). 186.

Expulsion. Subsequent injury. Contributory negligence. A person was put off a railroad train at the wrong station, at night, through negligence of the company in selling tickets to a point on its line at which its trains did not stop. The person failed to make any inquiry for a place to find shelter, when he might have found it upon inquiry. There were no houses or lights in sight, known to him, and the agent closed the depot almost immediately upon his arrival. *Held*, that by walking to his destination, instead of trying to find shelter, he contributed to his own injury, and was not entitled to recover. Texas & P. R. Co. *v.* Cole (Tex.). 144.

—— Walking back. Injury. The plaintiff, a lady passenger, was on the wrong train by her mistake and the fault of the defendant's agent. She was unwilling to pay her fare for being carried further on the train, when her mistake was discovered, and was put off at night at a lonely place. Owing to her surroundings, she was afraid to remain there until the arrival of the return train. She walked back to the next station, re-

PASSENGER—*Continued.*

ceiving severe injuries, and suffering from fright. At the trial a verdict for $8000 damages was rendered. *Held*, that the defendant was not entitled to have the jury instructed that if plaintiff was a trespasser, and refused to pay fare, she could be put off at any station, if plaintiff's uncontradicted testimony shows that she was on the train by an innocent and natural mistake. That the plaintiff was not precluded from recovering by the fact that she refused to be carried further on the train, or to remain at the place where she was put off. That the verdict was not excessive. International, etc., R. Co. *v.* Smith (Tex.). 148.

Expulsion. When proper cause exists for removal of a passenger from a railroad train, Mass. Pub. Stat. chap. 112, § 197, does not prohibit the company from putting him off the train at a regular passenger station, without arresting him. Beckwith *v.* Cheshire R. Co. (Mass.). 192.

—— Where a passenger on a railroad train, who had delivered his ticket to the conductor, was subsequently ejected by the latter, who took him by the arm, led him to the platform, and he thereupon got off, although this was done kindly, and he did not resist so as to require violence, yet the jury might find exemplary damages. The inconvenience, insult in the presence of fellow-passengers, and wounded feelings of the person ejected could be considered by the jury. Georgia R. Co. *v.* Homer (Ga.). 186.

—— While the good faith of a conductor, who improperly ejected a passenger, would not defeat the right to recover damages therefor, yet it might be considered in fixing the amount of such damages; and bad faith on the part of the conductor might be considered to increase the damages. Georgia R. Co. *v.* Homer (Ga.). 186.

Extraordinary diligence is the measure of care which conductors must exercise towards passengers. Georgia R. Co. *v.* Homer (Ga.). 186.

Freight train. A passenger on a freight train assumes the risks and inconveniences necessarily and reasonably incident thereto; but it is the duty of the railroad company, in such case, to exercise the highest degree of care consistent with the usual and practical operation of such trains, and the same presumptions arise in favor of a passenger injured thereon, while obeying the regulations of the company, as in the case of a passenger on any other train. Woolery *v.* Louisville, etc., R. Co. (Ind.). 210.

—— Plaintiff was a passenger on a freight train on the defendant road. Before the train reached the depot at the place of his destination, it stopped to do some switching. The plaintiff got up from his seat to see if he was to get off there. While walking to the door of the car a coupling was made, causing a violent jar, which threw plaintiff to the floor and injured him. In an action to recover damages for the injuries sustained, it was *held*, that the plaintiff was guilty of contributory negligence and could not recover; that the dangers naturally incident to travel by rail are greater on freight than on passenger trains, and call for a correspondingly higher degree of care on the part of passengers. Harris *v.* Hannibal, etc., R. Co. (Mo.). 216.

Getting off moving train. In a suit for damages for injuries sustained by a passenger on a gravity railroad in alighting while the train was moving no faster than a man can walk, past the point at which the conductor had promised to let him off, there was a conflict of testimony as to whether the conductor ordered him to get off or cautioned him against getting off until the train stopped. *Held*, that the fact of the passenger's negligence was for the jury. Delaware, etc., R. Co. *v.* Webster (Penna.). 160.

Getting off. Pregnant woman. Plaintiff, who was a large woman, and five months pregnant, was, with her two children, aged two and five years respectively, a passenger on defendant's road. On arriving at her destination, which was a regular stopping-place, and had a platform for the use of passengers, the train only slacked; the conductor told her to "get off." She asked how; he replied "Jump," and she did jump with the youngest child in her arms; *held*, that she was not guilty of contributory

PASSENGER—*Continued.*

negligence, and was entitled to recover. Baltimore, etc., R. Co. *v.* Lapley (Md.). 167.

Husband and wife. Action by husband for injuries to wife. 342 *n.*

Injury by striking bridge. The plaintiff was a passenger on one of defendant's street-cars. The car was of the kind usually called a double-decker, having two compartments for passengers, one above the other. As the car was crossing a bridge the plaintiff arose from his seat in the forward part of the upper section, and walked towards the rear, for the purpose of descending the platform, desiring to leave the car after it had passed the bridge. While walking in this manner his elbow came in contact with a portion of the bridge, which caused severe injury. The evidence showed that the portion of the truss which struck the plaintiff was distant about two inches from a perpendicular line drawn from the floor of the upper deck at the side next the bridge. In an action to recover damages for such injury it was *held* that the defendant was guilty of negligence, and was liable for the injury; that the fact that the passenger was injured while moving about on the floor of the car when it was in motion is not presumptive evidence of negligence on his part. President, etc., R. Co. *v.* Leonhardt (Md.). 194.

Jerk. Injury. Nonsuit. The plaintiff was riding on a horse-car of the defendant. The car inside was full of passengers, and the platform on which plaintiff was riding was crowded, and also the rear platform was full. He stood on the front platform, holding on, when the violence of the sudden jerk, caused by the driver whipping his horses, threw him off the car. The plaintiff was sworn and gave evidence in the cause. The company called witnesses, and introduced evidence to contradict testimony of the plaintiff. The president of the company was not allowed to give in evidence a statement made in writing by the conductor of the car after the accident. In an action to recover it was *held*, that it was not error to refuse to nonsuit. North Hudson Co. R. Co. *v.* May (N. J.). 151.

Jerk of car. Injury. A passenger in a railroad car, in obedience to a trainman's call to "change cars," and after the car, on arriving at a station, had so nearly stopped that it appeared to persons of ordinary intelligence and observation to have fully stopped, rose and walked towards the exit. He was thrown down and injured by a sudden jerk of the car. *Held*, that he was not chargeable with contributive negligence, and may recover damages for injuries received. Bartholomew *v.* New York Cent., etc., R. Co. (N. Y.). 154.

Jumping from car contributory negligence. 215.

Leaping from car. An instruction in such case, in substance, that "if the deceased jumped from the car while the train was running at the rate of 14 or 15 miles an hour, he was guilty of such contributory negligence as would defeat a recovery, unless at the time the circumstances were such as would reasonably have induced a man of ordinary prudence to believe that his life was in danger or that he was in danger of suffering great bodily harm, so that he was impelled to leap from the car in order to escape reasonably apprehended danger," *held* correct. Woolery *v.* Louisville, etc., R. Co. (Ind). 210.

Limitation of liability. Contract construed and held to relieve company from liability for damage to a passenger by reason of want of ordinary care by its servants. Annes *v.* Milwaukee, etc., R. Co. (Wis.). 102.

Messenger. Passenger accompanied by large sum of money on way to State treasury is not a "messenger" within the meaning of Cal. St. 1863–64, p. 344, imposing upon railroads the duty of transporting messengers and others upon certain occasions. Pfister *v.* Central Pac. R. Co. (Cal.). 246.

Mistake in ticket. Evidence. There was no error in ruling out what plaintiff said as to another person's conduct in correcting a mistake as to that person's ticket, or the price of it, it not being said in the presence of the conductor or communicated to him, but being said at or near the ticket office, before the plaintiff entered the car. Georgia R. Co. *v.* Homer (Ga.). 186.

PASSENGER—*Continued.*

Negligence: what is. Rule. In a suit against a railway company for damages resulting from personal injury to a passenger, the court charged the jury: "It is the duty of the defendant to exercise proper care to transport its passengers safely, and the want of such care is deemed in law negligence, for which the defendant is liable." *Held*, error, because susceptible of the construction that the failure to exercise a degree of care which will actually result in the safe carriage of passengers is negligence, for which the carrier would be liable. International, etc., R. Co. *v.* Underwood (Tex.). 240.

Passenger on street-car of one line has no right to a transfer ticket to a street-car on another line. Ellis *v.* Milwaukee City R. Co. (Wis.). 77.

Platform. Condition. Instruction. Where the court instructed the jury that if they were of opinion that the existence of a fender or guard would have prevented the accident, they were at liberty to find that the company was negligent in failing to provide it. *Held*, that this was error, as it was tantamount to saying that it was the duty of the company to provide the fender or guard. West Phila., etc., R. Co. *v.* Gallagher (Pa.). 201.

Platform: condition of. The absence of a guard or fender on the front platform of a street-car is a fact which may be taken into consideration with other facts in determining the question of the company's negligence. The court will not, however, say, as a matter of law, that it is negligence on the part of the company not to furnish such a guard. West Phila., etc., R. Co. *v.* Gallagher (Pa.). 202.

Presumed lawfully on train on which he has been carried for a considerable distance, although after his death by an accident a pass was found on his body belonging to another person. Louisville, etc., R. Co. *v.* Thompson (Ind.). 88.

Presumption of negligence in case of injury. Burden of proof. 287 *n.*

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Riding in perilous place: liability of carrier for injury to. 228 *n.*

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Riding on freight train. Plaintiff was voluntarily on the train where he was injured, by the invitation of the conductor, made at his own request; he paid no fare, and none was expected from him; he selected an open flat car, on which he rode rather than in the passenger coach, and was in a position where he was more exposed to accident from sparks and cinders than he would have been had he taken a seat in the closed coach. *Held*, that he was entitled to look only for such security as that mode of conveyance was reasonably expected to afford; and having voluntarily incurred the injury of which he complains, resulting from getting a cinder in his eye, he was not entitled to recover from the railroad, even if it were somewhat at fault. Higgins *v.* Cherokee R. Co. (Ga.). 218.

Riding on pass. Injury to. 114 *n.*

Riding on platform. 205 *n.*

Riding on step. A boy under fourteen got upon the lower step of the front platform of a crowded street-car and rode for a long distance as a passenger, holding on with but one hand. He was finally knocked off by the jolting of the car, run over, and injured. In an action against the street-car company to recover damages, *held*, that the questions of negligence and contributory negligence, taking into consideration the age and capacity of the lad, were both for the jury. West Phila., etc., R. Co. *v.* Gallagher (Pa.). 201.

Riding on step. It is not contributory negligence *per se* for a passenger to ride on the lower step of the front platform of a crowded street-car without objection by the driver or conductor. West Phila., etc., R. Co. *v.* Gallagher (Pa.). 201.

Right to ride on particular train. The plaintiff purchased of the defendant, a railroad company, a ticket from E. to S., when a train was approaching in the direction he wished to go. He boarded that train, and found by the company's regulations that train could not and would not stop at

PASSENGER—*Continued.*

S. He got off at the last stopping-place before reaching S., and walked the remaining distance. He sued the company for selling him a ticket by another train, which he claimed was represented to him as then about to proceed from E. to S. It was contended in the trial that it was a custom of the company not to sell a ticket to a station unless the train approaching would stop at that place. The ticket he purchased contained these words, "For this day and train only." It was *held*, (1) that a fixed custom by the agent of a railroad company would not prevail over the published notices and time-tables of such company, of which the plaintiff is presumed to have knowledge, unless the evidence showed that the custom was so prevalent that every one is supposed to know of its existence and to act with reference to it; that evidence by plaintiff and his witness to the effect that they have individually assumed the custom to exist, and acted upon it, though they have not tested or heard of it from others, is legally insufficient to establish it. (2) That the ticket marked as above stated does not of itself, in the absence of express representations to that effect by an agent of the company, imply a contract by it to carry such passenger to that station by that particular train when the posters and time-tables of the company showed that the train did not stop there, and by the custom of the company the ticket is good for any train on that day, or till used. Duling *v.* Phila., etc., R. Co. (Md.). 84.

Right to take passage on a particular train. 88 *n.*

Rule. Carriers of passengers do not warrant the safety of passengers, but they are held to the highest degree of practical care. Louisville, etc., R. Co. *v.* Pedigo (Ind.), 310; Moore *v.* Des Moines, etc., R. Co. (Iowa). 315.

Starting train. If a conductor has reason to believe that any passenger who has reached his destination, though dilatory, may be in the act of alighting, and he starts his train without examination or inquiry, and such passenger is in the act of alighting when the train is started, and is thereby injured, the company will be liable. Straus *v.* Kansas, etc., R. Co. (Mo.). 170.

—— If the train was stopped a sufficient length of time for plaintiff to conveniently alight, and, without any fault of defendant's servants, he failed to do so, and the conductor, not knowing and not having reason to suspect that the plaintiff was in the act of alighting, caused the train to start while he was so alighting, the defendant would not be liable. Straus *v.* Kansas, etc., R. Co. (Mo.). 170.

—— Duty of company. In an action against a railroad company by a passenger for injuries received in alighting from a train at the company's station, if the train did not stop a sufficient length of time to enable the plaintiff, by the use of reasonable expedition, to get off before it was again started, and it was so started while plaintiff was in the act of alighting, whereby he was thrown down and injured, the company is liable for the injury. Straus *v.* Kansas, etc., R. Co. (Mo.). 170.

Starting train while passenger is alighting. 179 *n.*

Statute requiring ticket-office to be kept open thirty minutes before train-time, which was not done. *Held*, that a passenger who entered the train could not lawfully be charged an extra sum for failing to purchase his ticket at the office, and could not be ejected on refusing to pay the conductor the extra fare demanded. Missouri Pacific R. Co. *v.* McClanahan (Tex.). 82.

Stepping off after descending a step toward platform *held* not negligence. Nichols *v.* Dubuque, etc., R. Co. (Iowa). 183.

The plaintiff, the county treasurer of Santa Clara county, and three employees were passengers on a train on defendant's road, for the purpose of going from San Jose to Sacramento. They had with them, in small leather satchels, $91,952, in gold coin, due the State from the plaintiff as county treasurer, and which they were taking to deliver to the State treasurer. No objection was made by the conductor of the train, who had knowledge of the contents of the satchels, until they reached Niles, a way station on the road. Here it was necessary to change cars, and

PASSENGER—*Continued.*

the conductor from Niles refused to permit the plaintiff and his employees to enter the train with their treasure, and required him to deliver the same to the Wells-Fargo Express Co., to whom the defendant had given the exclusive privilege of carrying money on its trains. The plaintiff at first refused to do this, and offered to go into the baggage car and pay any charges which might be exacted for the transportation of the money. This offer was refused, and, to avoid being left at Niles, the plaintiff delivered the money to the express company, paying for the transportation $68.95. *Held*, that no action lay against the company for thus refusing to carry the money. Pfister *v.* Central Pac. R. Co. (Cal.). 246.

Thrown from car by other passengers and killed. *Held*, company not liable. Felton *v.* Chicago, etc., R. Co. (Iowa). 229.

Track and machinery: degree of care imposed upon railroad company as to care of. 818 *n.*

Trestle: injury by falling upon. A passenger on defendant's road was carried past the station at which he wished to stop, and put off at the east end of a trestle across the river, and his gun was put out on the embankment after the train had crossed to the west end. When he boarded the train, he was directed to place the gun in the baggage car. He delivered it to a person there, who demanded and received 25 cents for the service. He walked across the trestle and got his gun, and in crossing back with it, his feet being wet and covered with mud, his foot slipped, and he fell upon the cross-ties, and received injury, for which he brought suit *Held*, that he could not recover. International, etc., R. Co. *v.* Willard (Tex.). 280.

Unforeseen accidents. A carrier of passengers is not obliged to foresee and provide against casualties which have not been known to occur before, and which may not be reasonably expected. If it has availed itself of the best known and most extensively used safeguards against danger, it has done all the law requires, and its liability is not to be ascertained by what appears for the first time after the disaster to be a proper precaution against its recurrence. Higgins *v.* Cherokee R. (Ga.). 218.

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State may enforce railway regulations with fines and penalties. McGowan *v.* Wilmington, etc., R. Co. (N. C.). 64.

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Negligence: sufficiency of amounts of. Coudy *v.* St. Louis, etc., R. Co. (Mo.). 282.

Special damages. When a person seeks to recover damages for a personal injury, he must aver special damage in order to recover any money expended by him or debt created on account of the injury. South Cov., etc., R. Co. *v.* Ware (Ky.). 206.

PRACTICE.

Argument of counsel. If counsel for one party discussed in argument questions outside of the issues made in the case, without objection being made thereto, and when his adversary, in reply, sought to do so likewise, he was interrupted, and was requested by the court to confine himself to the

PRACTICE—*Continued.*

case, this furnished no ground of exception. Higgins *v.* Cherokee R. Co. (Ga.). 218.

Argument of counsel. It is for the trial court to determine whether counsel in the conduct of a case, and in argument to the jury, transcend the limits of professional duty and propriety. Straus *v.* Kansas, etc., R. Co. (Mo.). 170.

Argument of counsel. Where counsel cannot agree as to the evidence in a cause, or misstate the evidence in argument to the jury, it is the peculiar province of the jury, and not of the court, to determine what the evidence was. Straus *v.* Kansas, etc., R. Co. (Mo.). 170.

Argument. When counsel in argument makes a statement of a material fact not in evidence, against the objection of the other party, he violates the right of a fair trial, and his client assumes the burden of presenting and proving his claim that the decision was not affected thereby. Bullard *v.* Boston, etc., R. Co. (N. H.). 117.

Bill of exceptions. Grounds of motion for a new trial, which complain that the court did not charge certain propositions of law, which he should have given in charge, but which do not show that his attention was especially called to these questions, or that a fuller or more particular charge on them than was given was requested, present no issue upon which this court can pass; and such grounds and a bill of exceptions predicated thereon fail to point out in what the alleged errors consist. Higgins *v.* Cherokee R. Co. (Ga.). 218.

Bill of exceptions must plainly specify not only the decision complained of, but the error alleged to exist therein, and without a compliance with this requirement this court cannot consider the points made under such general exceptions. Higgins *v.* Cherokee R. Co. (Ga.). 218.

Case tried below as an action *ex delicto* cannot be treated on appeal as an action *ex contractu*. Louisville, etc., R. Co. *v.* Thompson (Ind.). 329.

Nonsuit. There is no rule or practice which prohibits the discussion of a motion for nonsuit in the presence of the jury impanelled to try the case. The practice of removing the jury in certain cases, when questions of the admissibility of evidence are to be discussed, rests on peculiar reasons not applicable to a motion for nonsuit; and this practice will not be extended to other cases than those in which it has already been permitted. Higgins *v.* Cherokee R. Co. (Ga.). 218.

Remarks of counsel to jury. See VERDICT.

Supreme Court will not reverse on the mere weight of evidence. Lake Erie, etc., R. Co. *v.* Griffin (Mass.). 394.

Reversal. Evidence. In suits in equity, as well as in actions at law, the Underwood (Tex.). 240.

Reversal for failure to examine injury. See International, etc., R. Co. *v.*

Signing bill of exceptions. If a proper bill of exceptions is prepared and presented to the judge within the time allowed, his delay in signing and causing it to be filed will not deprive the party of its benefit. Ohio, etc., R. Co. *v.* Cosby (Ind.). 389.

PRESUMPTION.

See DEATH.

Rebuttal. The presumption of negligence arising from an injury to a passenger by the falling of a bridge is not rebutted by evidence that the carrier was using the means and appliances ordinarily used, without also showing that they were sufficient for the purpose, were properly used, and were without known or discoverable defects. Louisville, etc., R. Co. *v.* Pedigo (Ind.). 310.

Review. Qualification of charge. Where the entire charge is not sent up in the bill of exceptions or in the record, and the portion of the charge excepted to is error, without qualification, and when the judge who tried

PRESUMPTION—*Continued.*

the case makes no statement in his certificate which shows that it was qualified by other parts of the charge, this court will presume that there was no qualification. Central R. Co. *v.* Senn (Ga.). 304.

Where, in an action by a passenger against a railroad company for an injury received in operating its train, the occurrence of the injury through the mistake of the carrier is shown, a presumption of negligence arises against the latter which casts upon it the burden of showing that the accident happened notwithstanding the exercise on its part of the high degree of care which the law imposes on it. Coudy *v.* St. Louis, etc., R. Co. (Mo.). 282.

PROCESS.

Agent of company to be served. A civil engineer in charge of the surveys and location of the road of a railway company in the county where the appeal is taken, and having an office in the county, *held* to be an "agent" within the meaning of section 1254 of the Code, requiring service of notice of appeal upon the "agent or attorney" of the company. Jamison *v.* Burlington, etc., R. Co. (Iowa). 418.

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RATES.

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Discrimination: unjust, is not sanctioned by the common law. Indianapolis, etc., R. Co. *v.* Ervin (Ill.). 8.

Distance. Overcharges ordered repaid and rates to be reduced under an agreement made by a railroad company with shippers by which the company agreed to give a certain shipper as low rates on certain traffic as were given to any other shipper of similar traffic carried the same distance. Glasgow, etc., R. Co. *v.* Mackinnon (Eng.). 1.

Interstate tariffs not subject to regulation by State railroad commissioners. State *v.* Chicago & Northwestern R. Co. (Ia.). 15.

Interstate tariffs. Statute authorizing railroad commissioners of State to fix interstate rates *held* unconstitutional. Commonwealth *v.* Housatonic R. Co. (Mass.). 31.

Ordinance of Milwaukee provided that "Thereafter the rate of fare for a single passenger in any horse railway operated within the city of Milwaukee shall not exceed the sum of five cents." *Held* not to apply to connecting lines of roads afterwards built so as to entitle a person who had paid five cents on one line to continue his journey on another without additional charge. Ellis *v.* Milwaukee City R. Co. (Wis.). 77.

Rebates. Discrimination. An agreement between a shipper of goods by railroad and the general freight agent of a railroad company, that the former should pay the regular rates of freight charged to and paid by the public generally for similar services and like distances, and that the company should pay back to the shipper by way of rebate a portion of the freight so charged and paid thereby, giving to him a less rate for transportation than is given to the public generally, is void, as in violation of the statute against unjust discrimination between shippers, and such rebates of freight cannot be recovered by the shipper from the company. Indianapolis, etc., R. Co. *v.* Ervin (Ill.). 8.

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Regulation as to passenger rates *held* reasonable. Partee *v.* Georgia R. Co. (Ga.). 12.

Regulations. Freight trains. Regulations of the railroad commissioners fixing rates of fare for passengers to obtain tickets from the agents of the companies at their depots, as well as for those who do not, and prescribing the manner in which ticket-offices shall be kept open before and at the arrival of trains, do not apply to freight trains, but only to regular passenger trains. Partee *v.* Georgia R. Co. (Ga.). 12.

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STATION.

Averment as to platform being "out of repair" and "wholly unsuitable for the reception of passengers" does not, as a matter of law, show negligence in the railway company, which as to such platform is only held to that reasonable degree of care for the safety and protection of its patrons, having regard to the nature of its business, as is demanded of individuals upon whose premises others come by invitation or inducement for the transaction of business. Pennsylvania Co. *v.* Marion (Ind.). 132.

Defective appointments. Company liable for injury to passengers occasioned by. 130 *n.*

Pier. Passageway. Safety. The appellant was the owner of a pier which was used for the accommodation of those engaged in traffic with it. The ground abutting upon said pier also belonged to appellant, on which were constructed tracks for the running of cars and engines, for the purpose of conveying articles of merchandise to and from the pier, and other piers and wharves adjacent thereto. There was also a trestle, with railway tracks on it, and a gangway, on the side of which persons can walk. At the end towards the pier the ascent to and descent from this trestle was by a stairway; in descending this stairway the appellee, who was a steward upon a vessel lying at the pier by permission of the appellant, was injured by a fall occasioned by the broken condition of the steps. In an action to recover damages, on the ground that the injury was caused by the negligence of the defendant in not keeping the said steps in proper condition to afford a safe transit, *held*, that a right of transit to and from the pier was implied in the arrangement between the two companies, and that, in the absence of proof that a particular way had been constructed

STATION—*Continued.*

and designated for the purpose of ingress and egress, persons could use any way not prohibited by the defendant. Baltimore, etc., R. Co. *v.* Rose (Md.). 125.

Platform: defective. When an injury occurred in December, evidence of the condition of the platform is not competent unless it is shown that its condition was substantially unchanged. Pennsylvania Co. *v.* Marion (Ind.). 132.

Platform higher than platforms at other station *held* immaterial. Nichols *v.* Dubuque, etc., R. Co. (Ia.). 183.

Platform: injury upon. A passenger started to leave the depot platform at a place not intended for that purpose, with a view of crossing the track at a point where she had no right to cross it. While still on the platform, she received an injury caused by the negligence of the defendant's servants. *Held*, that the company was liable; that when it provides a platform at its station in such a manner as to invite passengers to walk over it while waiting for trains, or while preparing to leave the station, it is bound to exercise due care towards such passengers while upon the platform. Keefe *v.* Boston, etc., R. Co. (Mass.). 137.

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THE

INTERSTATE COMMERCE LAW.

WITH ANNOTATIONS

By ADELBERT HAMILTON,

Editor of the American and English Railroad Cases and American and English Corporation Cases.

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PREFACE.

IN presenting the Interstate Commerce Act to our subscribers, we also print with it the principal statutes enacted by parliament for the regulation of railways in Great Britain. We do this because the portion of the Interstate Commerce Act relating to discriminations by railway companies is in substance a reënactment of similar provisions in the English statute. The latter having for many years been before the courts, railway commissioners and traffic managers of Great Britain, for interpretation and construction, it is believed that their opinions as to the meaning of the older statute may be, so far as they are known, useful guides for American courts, commissioners, and managers, in applying the American statute to cases similar to those which have already arisen in Great Britain.

Following the statutes is printed a digest of all the cases, so far as we have been able to find them, involving the decision of questions concerning railway rates, or concerning discriminations by railway companies either in the rates or the facilities of transportation. Inasmuch as the principle of reasonableness and equality of common (including railway) carriers' rates and facilities is one which, although formulated in the statutes printed below, is in reality an oft-enunciated and well-established principle of the common law of all English-speaking nations, as is exemplified by many decisions, we have included in the digest, most, if not all, of the common-law decisions touching railway rates, and some of the common-law decisions touching discriminations in railway facilities.

Especial pains have been taken in indexing the digest so as to make the information in it readily accessible. In preparing the index, the questions likely to occur in the practical application of the Interstate statute to the problems of transporation were kept constantly in mind so far as they were known or anticipated, the wish being to make the index, so far as possible, suggest the questions likely to arise and indicate fully what light has been thrown upon them by the adjudicated cases.

THE INTERSTATE COMMERCE ACT.

AN ACT TO REGULATE COMMERCE.

(*Approved February 4, 1887.*)

CLASSES OF CARRIERS TO WHOM THE ACT APPLIES.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of this act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management, or arrangement, for a continuous carriage or shipment, from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any other place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country: Provided, however, That the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State, and not shipped to or from a foreign country from or to any State or Territory as aforesaid.

TERMS "RAILROAD" AND "TRANSPORTATION" DEFINED.

The term "railroad" as used in this act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term "transportation" shall include all instrumentalities of shipment or carriage.

UNJUST AND UNREASONABLE CHARGES PROHIBITED.

All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage, or handling of such property, shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful.

UNJUSTLY DISCRIMINATIVE SPECIAL RATES, REBATES, DRAWBACKS, ETC., PROHIBITED.

Sec. 2. That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

UNDUE OR UNREASONABLE PREFERENCES, ADVANTAGES, PREJUDICES AND DISADVANTAGES PROHIBITED.

Sec. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particu-

lar person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

UNJUST DISCRIMINATION BETWEEN CONNECTING LINES PROHIBITED.

Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its track or terminal facilities to another carrier engaged in like business.

LESS CHARGE FOR LONG HAUL THAN FOR INCLUDED SHORT HAUL OF SIMILAR TRAFFIC PROHIBITED, EXCEPT WHEN AUTHORIZED BY THE INTERSTATE COMMERCE COMMISSIONERS.

Sec. 4. That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this act to charge and receive as great compensation for a shorter as for a longer distance: Provided, however, That upon application to the Commission appointed under the provision of this act, such common carrier may, in special cases, after investigation by the Commission, be authorized to charge less for longer than for shorter

distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this act.

POOLING PROHIBITED.

Sec. 5. That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any case of an agreement for the pooling of freights as aforesaid, each day of its continuance shall be deemed a separate offence.

SCHEDULES OF FREIGHT RATES AND PASSENGER FARES TO BE KEPT IN ALL DEPOTS AND STATIONS.

Sec. 6. That every common carrier subject to the provisions of this act shall print and keep for public inspection schedules showing the rates and fares and charges for the transportation of passengers and property which any such common carrier has established and which are in force at the time upon its railroad, as defined by the first section of this act. The schedules printed as aforesaid by any such common carrier shall plainly state the places upon its railroad between which property and passengers will be carried, and shall contain the classification of freight in force upon such railroad, and shall also state separately the terminal charges and any rules or regulations which in any wise change, affect, or determine any part of the aggregate of such aforesaid rates and fares and charges. Such schedules shall be plainly printed in large type, of at least the size of ordinary pica, and copies for the use of the public shall be kept in every depot or station upon any such railroad, in such places and in such form that they can be conveniently inspected.

SCHEDULES OF FREIGHT RATES THROUGH FOREIGN COUNTRIES TO BE KEPT AT EVERY DEPOT WHERE SUCH FREIGHT IS RECEIVED—PENALTY FOR NEGLECT.

Any common carrier subject to the provisions of this act receiving freight in the United States to be carried through a foreign country to any place in the United States shall also in like manner print and keep for public inspection, at every depot where such freight is received for shipment, schedules showing the through rates established and charged by such common carrier to all points in the United States beyond the foreign country to which it accepts freight for shipment; and any freight shipped from the United States through a foreign country into the United States, the through rate on which shall not have been made public as required by this act, shall, before it is admitted into the United States from said foreign country, be subject to customs duties as if said freight were of foreign production; and any law in conflict with this section is hereby repealed.

NO ADVANCE IN RATES, FARES, OR CHARGES SO PUBLISHED TO BE MADE WITHOUT TEN DAYS' NOTICE—REDUCTIONS TO BE POSTED IMMEDIATELY.

No advance shall be made in the rates, fares, and charges which have been established and published as aforesaid by any common carrier in compliance with the requirements of this section, except after ten days' public notice, which shall plainly state the changes proposed to be made in the schedule then in force, and the time when the increased rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept for public inspection. Reductions in such published rates, fares, or charges may be made without previous public notice; but whenever any such reduction is made, notice of the same shall immediately be publicly posted and the changes made shall immediately be made public by printing new schedules, or shall immediately be plainly indicated upon the schedules at the time in force and kept for public inspection.

CHARGES NOT ACCORDING TO SCHEDULES PROHIBITED.

And when any such common carrier shall have established and published its rates, fares, and charges in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any services in connection therewith, than is specified in such published schedule of rates, fares, and charges as may at the time be in in force.

SCHEDULES, CONTRACTS, JOINT TARIFFS, ETC., TO BE FILED WITH THE COMMISSION—TO BE PUBLISHED WHEN DIRECTED BY THE COMMISSION.

Every common carrier subject to the provisions of this act shall file with the Commission hereinafter provided for copies of its schedules of rates, fares, and charges which have been established and published in compliance with the requirements of this section, and shall promptly notify said Commission of all changes made in the same. Every such common carrier shall also file with said Commission copies of all contracts, agreements, or arrangements with other common carriers in relation to any traffic affected by the provisions of this act to which it may be a party. And in cases where passengers and freight pass over continuous lines or routes operated by more than one common carrier, and the several common carriers operating such lines or routes establish joint tariffs of rates, or fares, or charges for such continuous lines or routes, copies of such joint tariffs shall also, in like manner, be filed with said Commission. Such joint rates, fares, and charges on such continuous lines so filed as aforesaid shall be made public by such common carriers when directed by said Commission, in so far as may, in the judgment of the Commission, be deemed practicable; and said Commission shall from time to time prescribe the measure of publicity which shall be given to such rates, fares, and charges, or to such part of them as it may deem it practicable for such common carriers to publish, and the places in which they shall be pub-

lished; but no common carrier party to any such joint tariff shall be liable for the failure of any other common carrier party thereto to observe and adhere to the rates, fares, or charges, thus made and published.

PENALTY FOR VIOLATING THIS SECTION—REMEDIES.

If any such common carrier shall neglect or refuse to file or publish its schedules or tariffs of rates, fares, and charges as provided in this section, or any part of the same, such common carrier shall, in addition to other penalties herein prescribed, be subject to a writ of *mandamus*, to be issued by any circuit court of the United States in the judicial district wherein the principal office of said common carrier is situated or wherein such offence may be committed, and if such common carrier be a foreign corporation, in the judicial circuit wherein such common carrier accepts traffic and has an agent to perform such service, to compel compliance with the aforesaid provisions of this section; and such writ shall issue in the name of the people of the United States, at the relation of the commissioners appointed under the provisions of this act; and failure to comply with its requirements shall be punishable as and for a contempt; and the said Commissioners, as complainants, may also apply, in any such circuit court of the United States, for a writ of injunction against such common carrier, to restrain such common carrier from receiving or transporting property among the several States and Territories of the United States, or between the United States and the adjacent foreign countries, or between ports of transshipment and of entry and the several States and Territories of the United States, as mentioned in the first section of this act, until such common carrier shall have complied with the aforesaid provisions of this section of this act.

COMBINATIONS TO MAKE CARRIAGE NOT CONTINUOUS PROHIBITED.

Sec. 7. That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any combination, contract, or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars, or

by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being and being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage, or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this act.

CARRIER TO BE LIABLE IN DAMAGES TO PERSONS INJURED, FOR VIOLATING THIS ACT.

Sec. 8. That in case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

ACTIONS FOR THE RECOVERY OF DAMAGES BY PERSONS INJURED—EVIDENCE.

Sec. 9. That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same

shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

PENALTY FOR INDIVIDUAL VIOLATION BY OFFICER, RECEIVER, EMPLOYEE, ETC.

Sec. 10. That any common carrier subject to the provisions of this act, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall wilfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter, or thing in this act prohibited or declared to be unlawful, or who shall aid or abet therein, or shall wilfully omit or fail to do any act, matter, or thing in this act required to be done, or shall cause or willingly suffer or permit any act, matter, or thing so directed or required by this act to be done not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this act, or shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offence was committed, be subject to a fine of not to exceed five thousand dollars for each offence.

COMMISSION ESTABLISHED—APPOINTMENT, TERMS, REMOVAL AND QUALIFICATIONS OF COMMISSIONERS.

Sec. 11. That a commission is hereby created and established to be known as the Inter-State Commerce Commission, which shall be composed of five Commissioners, who shall be appointed by the President, by and with the advice and con-

sent of the Senate. The Commissioners first appointed under this act shall continue in office for the term of two, three, four, five, and six years, respectively, from the first day of January, anno Domini eighteen hundred and eighty-seven, the term of each to be designated by the President; but their successors shall be appointed for terms of six years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired time of the Commissioner whom he shall succeed. Any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. Not more than three of the Commissioners shall be appointed from the same political party. No person in the employ of or holding any official relation to any common carrier subject to the provisions of this act, or owning stock or bonds thereof, or who is in any manner pecuniarily interested therein, shall enter upon the duties of or hold such office. Said Commissioners shall not engage in any other business, vocation, or employment. No vacancy in the Commission shall impair the right of the remaining Commissioners to exercise all the powers of the Commission.

POWERS OF COMMISSION.

Sec. 12. That the Commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created; and for the purposes of this act the Commission shall have power to require the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation, and to that end may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section.

CO-OPERATIVE JURISDICTION OF U. S. CIRCUIT COURTS.

And any of the circuit courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpœna issued to any common carrier subject to the provisions of this act, or other person, issue an order requiring such common carrier or other person to appear before said Commission (and produce books and papers if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying; but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

PROCEDURE FOR PROCURING INVESTIGATION BY THE COMMISSION.

Sec. 13. That any person, firm, corporation, or association, or any mercantile, agricultural, or manufacturing society, or any body politic or municipal organization complaining of anything done or omitted to be done by any common carrier subject to the provisions of this act in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the charges thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time, to be specified by the Commission. If such common carrier, within the time specified, shall make reparation for the injury alleged to have been done, said carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

INVESTIGATION AT REQUEST OF STATE OR TERRITORIAL RAILROAD COMMISSIONERS.

Said Commission shall in like manner investigate any complaint forwarded by the Railroad Commissioner or Railroad Commission of any State or Territory, at the request of such Commissioner or Commission, and may institute any inquiry on its own motion in the same manner and to the same effect as though complaint had been made.

NO COMPLAINT TO BE DISMISSED FOR WANT OF DIRECT DAMAGE TO THE COMPLAINANT.

No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

REPORT OF INVESTIGATION.

Sec. 14. That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall include the findings of fact upon which the conclusions of the Commission are based, together with its recommendation as to what reparation, if any, should be made by the common carrier to any party or parties who may be found to have been injured; and such findings so made shall thereafter, in all judicial proceedings, be deemed *prima facie* evidence as to each and every fact found.

RECORDS OF COMMISSION.

All reports of investigations made by the Commission shall be entered of record, and a copy thereof shall be furnished to the party who may have complained, and to any common carrier that may have been complained of.

ORDERS OF THE COMMISSION TO CARRIERS FOUND VIOLATING THE ACT—EXONERATION UPON COMPLIANCE.

Sec. 15. That if in any case in which an investigation shall be made by said Commission it shall be made to appear to the satisfaction of the Commission, either by the testimony of

witnesses or other evidence, that anything has been done or omitted to be done in violation of the provisions of this act, or of any law cognizable by said Commission, by any common carrier, or that any injury or damage has been sustained by the party or parties complaining, or by other parties aggrieved in consequence of any such violation, it shall be the duty of the Commission to forthwith cause a copy of its report in respect thereto to be delivered to such common carrier, together with a notice to said common carrier to cease and desist from such violation, or to make reparation for the injury so found to have been done, or both, within a reasonable time, to be specified by the Commission; and if, within the time specified, it shall be made to appear to the Commission that such common carrier has ceased from such violation of law, and has made reparation for the injury found to have been done, in compliance with the report and notice of the Commission, or to the satisfaction of the party complaining, a statement to that effect shall be entered of record by the Commission, and the said common carrier shall thereupon be relieved from further liability or penalty for such particular violation of law.

PROCEDURE TO ENFORCE OBEDIENCE TO ORDERS.

Sec. 16. That whenever any common carrier, as defined in and subject to the provisions of this act, shall violate or refuse or neglect to obey any lawful order or requirement of the Commission in this act named, it shall be the duty of the Commission, and lawful for any company or person interested in such order or requirement, to apply, in a summary way, by petition, to the circuit court of the United States sitting in equity in the judicial district in which the common carrier complained of has its principal office, or in which the violation or disobedience of such order or requirement shall happen, alleging such violation or disobedience, as the case may be; and the said court shall have power to hear and determine the matter, on such short notice to the common carrier complained of as the court shall deem reasonable; and such notice may be served on such common carrier, his or its officers, agents, or servants, in such manner as the court

shall direct; and said court shall proceed to hear and determine the matter speedily as a court of equity, and without the formal pleadings and proceedings applicable to ordinary suits in equity, but in such manner as to do justice in the premises; and to this end such court shall have power, if it think fit, to direct and prosecute, in such mode and by such persons as it may appoint, all such inquiries as the court may think needful to enable it to form a just judgment in the matter of such petition; and on such hearing the report of said Commission shall be *prima facie* evidence of the matters therein stated; and if it be made to appear to such court, on such hearing or on report of any such person or persons, that the lawful order or requirement of said Commission drawn in question has been violated or disobeyed, it shall be lawful for such court to issue a writ of injunction or other proper process, mandatory or otherwise, to restrain such common carrier from further continuing such violation or disobedience of such order or requirement of said Commission, and enjoining obedience to the same; and in case of any disobedience of any such writ of injunction or other proper process, mandatory or otherwise, it shall be lawful for such court to issue writs of attachment, or any other process of said court incident or applicable to writs of injunction or other proper process, mandatory or otherwise, against such common carrier, and if a corporation, against one or more of the directors, officers, or agents of the same, or against any owner, lessee, trustee, receiver, or other person failing to obey such writ of injunction or other proper process, mandatory or otherwise; and said court may, if it shall think fit, make an order directing such common carrier or other person so disobeying such writ of injunction or other proper process, mandatory or otherwise, to pay such sum of money not exceeding for each carrier or person in default the sum of five hundred dollars for every day after a day to be named in the order that such carrier or other person shall fail to obey such injunction or other proper process, mandatory or otherwise; and such moneys shall be payable as the court shall direct, either to the party complaining, or into court to abide the ultimate decision of the court, or into the Treasury; and payment thereof may, without prejudice to any other mode of

recovering the same, be enforced by attachment or order in the nature of a writ of execution, in like manner as if the same had been recovered by a final decree *in personam* in such court. When the subject in dispute shall be of the value of two thousand dollars or more, either party to such proceeding before said court may appeal to the Supreme Court of the United States, under the same regulations now provided by law in respect of security for such appeal; but such appeal shall not operate to stay or supersede the order of the court or the execution of any writ or process thereon; and such court may, in every such matter, order the payment of such costs and counsel fees as shall be deemed reasonable. Whenever any such petition shall be filed or presented by the commission, it shall be the duty of the District Attorney, under the direction of the Attorney General of the United States, to prosecute the same; and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States. For the purposes of this act, excepting its penal provisions, the circuit courts of the United States shall be deemed to be always in session.

REGULATION OF THE PROCEEDINGS OF THE COMMISSION.

Sec. 17. That the Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice, a majority of the Commission shall constitute a quorum for the transaction of business, but no Commissioner shall participate in any hearing or proceeding in which he has any pecuniary interest. Said Commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, including forms of notices and the service thereof, which shall conform, as nearly as may be, to those in use in the courts of the United States. Any party may appear before said Commission and be heard, in person or by attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of either party interested. Said Commission shall have an official seal,

which shall be judicially noticed. Either of the members of the Commission may administer oaths and affirmations.

SALARIES OF COMMISSIONERS, SECRETARY AND EMPLOYEES—OFFICES AND OFFICE SUPPLIES: WITNESS FEES AND MILEAGE—EXPENSES.

Sec. 18. That each Commissioner shall receive an annual salary of seven thousand five hundred dollars, payable in the same manner as the salaries of judges of the courts of the United States. The Commission shall appoint a Secretary, who shall receive an annual salary of three thousand five hundred dollars, payable in like manner. The Commission shall have authority to employ and fix the compensation of such other employees as it may find necessary to the proper performance of its duties, subject to the approval of the Secretary of the Interior.

The Commission shall be furnished by the Secretary of the Interior with suitable offices and all necessary office supplies. Witnesses summoned before the Commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. All of the expenses of the Commission, including all necessary expenses for transportation incurred by the Commissioners, or by their employees under their orders, in making any investigation in any other places than in the city of Washington, shall be allowed and paid, on the presentation of itemized vouchers therefor approved by the Chairman of the Commission and the Secretary of the Interior.

PRINCIPAL OFFICE OF THE COMMISSION—SESSIONS ELSEWHERE.

Sec. 19. That the principal office of the Commission shall be in the city of Washington, where its general sessions shall be held; but, whenever the convenience of the public or of the parties may be promoted, or delay or expense prevented thereby, the Commission may hold special sessions in any part of the United States. It may, by one or more of the Commissioners, prosecute any inquiry necessary to its duties, in any part of the United States, into any matter or question of fact pertaining to the business of any common carrier subject to the provisions of this act.

CARRIERS TO MAKE ANNUAL REPORTS TO THE COMMISSION IF REQUIRED.

Sec. 20. That the Commission is hereby authorized to require annual reports from all common carriers subject to the provisions of this act, to fix the time and prescribe the manner in which such reports shall be made, and to require from such carriers specific answers to all questions upon which the Commission may need information. Such annual reports shall show in detail the amount of capital stock issued, the amounts paid therefor, and the manner of payment for the same; the dividends paid, the surplus fund, if any, and the number of stockholders; the funded and floating debts, and the interest paid thereon; the cost and value of the carrier's property, franchises, and equipment; the number of employees and the salaries paid each class; the amounts expended for improvements each year, how expended, and the character of such improvements; the earnings and receipts from each branch of business and from all sources; the operating and other expenses; the balances of profit and loss; and a complete exhibit of the financial operations of the carrier each year, including an annual balance-sheet. Such reports shall also contain such information in relation to rates or regulations concerning fares or freights, or agreements, arrangements, or contracts with other common carriers, as the Commission may require; and the said Commission may, within its discretion, for the purpose of enabling it the better to carry out the purposes of this act, prescribe (if in the opinion of the Commission it is practicable to prescribe such uniformity and methods of keeping accounts) a period of time within which all common carriers subject to the provisions of this act shall have, as near as may be, a uniform system of accounts, and the manner in which such accounts shall be kept.

ANNUAL REPORTS OF THE COMMISSION.

Sec. 21. That the Commission shall, on or before the first day of December in each year, make a report to the Secretary of the Interior, which shall be by him transmitted to Congress, and copies of which shall be distributed as are the other

reports issued from the Interior Department. This report shall contain such information and data collected by the Commission as may be considered of value in the determination of questions connected with the regulation of commerce, together with such recommendations as to additional legislation relating thereto as the Commission may deem necessary.

EXCEPTIONS FROM THE OPERATION OF THE ACT.

Sec. 22. That nothing in this act shall apply to the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the issuance of mileage, excursion, or commutation passenger tickets; nothing in this act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion; nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees; and nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies: Provided, That no pending litigation shall in any way be affected by this act.

APPROPRIATION.

Sec. 23. That the sum of one hundred thousand dollars is hereby appropriated for the use and purposes of this act for the fiscal year ending June 30th, anno Domini 1888, and the intervening time anterior thereto.

TIME AT WHICH THE ACT TAKES EFFECT.

Sec. 24. That the provisions of sections 11 and 18 of this act, relating to the appointment and organization of the Commission herein provided for, shall take effect immediately, and the remaining provisions of this act shall take effect sixty days after its passage.

17 and 18 Vict. c, 31.

AN ACT FOR THE BETTER REGULATION OF THE TRAFFIC ON RAILWAYS AND CANALS.

(*10th July*, 1854.)

Whereas it is expedient to make better provision for regulating the traffic on railways and canals: be it enacted, etc., as follows:

BOARD OF TRADE.

1. In the construction of this act "the Board of Trade" shall mean the lords of the committee of her Majesty's privy council for trade and foreign plantations

TRAFFIC.

The word "traffic" shall include not only passengers, and their luggage, and goods, animals and other things conveyed by any railway company or canal company, or railway and canal company, but also carriages, wagons, trucks, boats, and vehicles of every description, adapted for running or passing on the railway or canal of any such company:

RAILWAY.

The word "railway" shall include every station of or belonging to such railway used for the purposes of public traffic; and,

CANAL.

The word "canal" shall include any navigation whereon tolls are levied by authority of parliament, and also the wharves and landing places of and belonging to such canal or navigation, and used for the purposes of public traffic:

COMPANY.

The expression "railway company," "canal company," or "railway and canal company," shall include any person being the owner or lessee of, or any contractor working any railway or canal or navigation, constructed or carried on under the powers of any act of parliament:

STATION NEAR.

A station, terminus, or wharf shall be deemed to be near another station, terminus, or wharf, when the distance between such stations, termini, or wharves shall not exceed one mile, such stations not being situate within five miles from St. Paul's Church, in London.

FORWARDING ETC., OF TRAFFIC WITHOUT UNREASONABLE DELAY OR PREFERENCE.

2. Every railway company, canal company, and railway and canal company, shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to, or worked by, such companies respectively, and for the return of carriages, trucks, boats, and other vehicles, and no such company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; and every railway company and canal company and railway and canal company having or working railways or canals which form part of a continuous line of railway or canal or railway and canal communication, or which have the terminus, station, or wharf of the one near the terminus, station, or wharf of the other, shall afford all due and reasonable facilities for receiving and forwarding all the traffic arriving by one of such railways or canals by the other, without any

unreasonable delay, and without any such preference or advantage, or prejudice or disadvantage as aforesaid, and so that no obstruction may be offered to the public desirous of using such railways or canals or railways and canals as a continuous line of communication, and so that all reasonable accommodation may, by means of the railways and canals of the several companies, be at all times afforded to the public in that behalf.

APPLICATION OF PARTIES COMPLAINING TO COURT OF COMMON PLEAS, ETC.—APPLICATION OF ATTORNEY GENERAL—INQUIRIES—INJUNCTION—ATTACHMENT—ORDER FOR PAYMENT OF MONEY—ENFORCEMENT OF ORDER.

3. It shall be lawful for any company or person complaining against any such companies or company of anything done, or of any omission made in violation or contravention of this act, to apply in a summary way, by motion or summons, in England to her Majesty's court of common pleas at Westminster, or in Ireland to any of her Majesty's superior courts in Dublin, or in Scotland to the court of session in Scotland, as the case may be, or to any judge of any such court; and upon the certificate to her Majesty's attorney-general in England or Ireland, or her Majesty's lord advocate in Scotland, of the Board of Trade alleging any such violation or contravention of this act by any such companies or company, it shall also be lawful for the said attorney-general, or lord advocate, to apply in like manner to any such court or judge, and in either of such cases it shall be lawful for such court or judge to hear and determine the matter of such complaint; and for that purpose, if such court or judge shall think fit, to direct and prosecute, in such mode and by such engineers, barristers, or other persons as they shall think proper, all such inquiries as may be deemed necessary to enable such court or judge to form a just judgment on the matter of such complaint; and if it be made to appear to such court or judge on such hearing, or on the report of any such person that anything has been done or omission made in violation or contravention of this act by such company or companies, it shall be lawful for such court or judge to issue a writ of in-

junction or interdict, restraining such company or companies from further continuing such violation or contravention of this act, and enjoining obedience to the same; and in case of disobedience of any such writ of injunction or interdict, it shall be lawful for such court or judge to order that a writ or writs of attachment, or any other process of such court incident or applicable to writs of injunction or interdict, shall issue against any one or more of the directors of any company, or against any owner, lessee, contractor, or other person, failing to obey such writ of injunction or interdict; and such court or judge may also, if they or he shall think fit, make an order directing the payment by any one or more of such companies of such sum of money as such court or judge shall determine, not exceeding for each company the sum of two hundred pounds for every day, after a day to be named in the order, that such company shall fail to obey such injunction or interdict; and such moneys shall be payable as the court or judge may direct, either to the party complaining, or into court to abide the ultimate decision of the court, or to her Majesty; and payment thereof may, without prejudice to any other mode of recovering the same, be enforced by attachment or order in the nature of a writ of execution, in like manner as if the same had been recovered by decree or judgment in any superior court at Westminster or Dublin, in England or Ireland, and in Scotland by such diligence as is competent on an extracted decree of the court of session; and in any such proceeding as aforesaid, such court or judge may order and determine that all or any cost thereof or thereon incurred shall and may be paid by or to the one party or the other, as such court or judge shall think fit; and it shall be lawful for any such engineer, barrister, or other person, if directed so to do by such court or judge, to receive evidence on oath relating to the matter of any such inquiry, and to administer such oath.

THE REGULATION OF RAILWAYS ACT, 1868.

(31 *and* 32 *Vict. c.* 119.)

INTERPRETATION OF TERMS.

Sec. 2. In this act—

The term "railway" means the whole or any portion of a railway or tramway, whether worked by steam or otherwise.

The term "company" means a company incorporated, either before or after the passing of this act, for the purpose of constructing, maintaining, or working a railway in the United Kingdom (either alone or in conjunction with any other purpose), and includes, except when otherwise expressed, any individual or individuals not incorporated who are owners or lessees of a railway in the United Kingdom, or parties to an agreement for working a railway in the United Kingdom.

The term "person" includes a body corporate.

PROVISION FOR SECURING EQUALITY OF TREATMENT WHERE RAILWAY COMPANY WORKS STEAM VESSELS.

Sec. 16. Where a company is authorized to build, or buy, or hire, and to use, maintain, and work, or to enter into arrangements for using, maintaining, or working, steam vessels for the purpose of carrying on a communication between any towns or ports, and to take tolls in respect of such steam vessels, then and in every such case tolls shall be at all times charged to all persons equally and after the same rate in respect of passengers conveyed in a like vessel passing between the same places under like circumstances; and no reduction or advance in the tolls shall be made in favor of or against any person using the steam vessels in consequence of his having travelled or being about to travel on the whole or any part of the company's railway, or not having travelled or not being about to travel on any part

thereof, or in favor of or against any person using the railway in consequence of his having used or being about to use or his not having used or not being about to use the steam vessels; and where an aggregate sum is charged by the company for conveyance of a passenger by a steam vessel and on the railway, the ticket shall have the amount of toll charged for conveyance by the steam vessel distinguished from the amount charged for conveyance on the railway.

The provisions of the Railway and Canal Traffic Act, 1854, so far as the same are applicable, shall extend to the steam vessels and to the traffic carried on thereby.

(36 *and* 37 *Vict. C.* 48).

AN ACT TO MAKE BETTER PROVISION FOR CARRYING INTO EFFECT THE RAILWAY AND CANAL TRAFFIC ACT, 1854, AND FOR OTHER PURPOSES CONNECTED THEREWITH.

(*July* 21, 1873.)

Be it enacted as follows:

PRELIMINARY.

SHORT TITLE.

1. This act may be cited as the Regulation of Railways Act, 1873.

COMMENCEMENT OF ACT.

2. This act shall, except as herein is otherwise expressly provided, come into operation on the first day of September, one thousand eight hundred and seventy-three, which date is in this act referred to as the commencement of this act.

DEFINITIONS.

3. In this act—

The term "railway company" includes any person being the owner or lessee of, or working any railway in the United Kingdom constructed or carried on under the powers of any act of parliament.

The term "canal company" includes any person being the owner or lessee of, or working, or entitled to charge

tolls for the use of any canal in the United Kingdom constructed or carried on under the powers of any act of parliament:

The term "person" includes a body of persons corporate or incorporate:

The term "railway" includes every station, siding, wharf, or dock of or belonging to such railway and used for the purposes of public traffic:

The term "canal" includes any navigation which has been made under or upon which tolls may be levied by authority of parliament, and also the wharves and landing-places of and belonging to such canal or navigation, and used for the purposes of public traffic:

The term "traffic" includes not only passengers and their luggage, goods, animals, and other things, conveyed by any railway company or canal company, but also carriages, wagons, trucks, boats, and vehicles of every description adapted for running or passing on the railway or canal of any such company:

The term "mails" includes mail-bags and post-letter-bags:

The term "special act" means a local or local and personal act, or an act of a local and personal nature, and includes a provisional order of the Board of Trade confirmed by act of parliament, and a certificate granted by the Board of Trade under the Railways Construction Facilities Act, 1864:

The term "the treasury" means the commissioners of her Majesty's treasury for the time being:

The term "superior court" means in England any of her Majesty's superior courts at Westminster, in Ireland any of her Majesty's superior courts at Dublin, and in Scotland the Court of Session.

Appointment and Duties of Railway Commissioners.

Appointment of Railway Commissioners.

4. For the purpose of carrying into effect the provisions of the Railway and Canal Traffic Act, 1854, and of this act, it shall be lawful for her Majesty at any time after the passing of this act, by warrant under the royal sign manual, to appoint

not more than three Commissioners, of whom one shall be of experience in the law, and one of experience in railway business, and not more than two Assistant Commissioners, and upon the occurrence of any vacancy in the office of any such Commissioner or Assistant Commissioner from time to time in like manner to appoint some fit person to fill the vacancy. It shall be lawful for the lord chancellor, if he think fit, to remove for inability or misbehavior any Commissioner appointed in pursuance of this act.

The three Commissioners appointed under this act (and in this act referred to as the Commissioners) shall be styled the Railway Commissioners, and shall have an official seal which shall be judicially noticed. They may act notwithstanding any vacancy in their number. The said Assistant Commissioners shall hold office during the pleasure of her Majesty.

COMMISSIONERS NOT TO BE INTERESTED IN RAILWAY OR CANAL STOCK.

5. Any person appointed a Commissioner under this act shall within three calendar months after his appointment absolutely sell and dispose of any stock, share, debenture stock, debenture bond, or other security of any railway or canal company in the United Kingdom which he shall at the time of his appointment own or be interested in for his own benefit; and it shall not be lawful for any person appointed a Commissioner under this act, so long as he shall hold office as such Commissioner, to purchase, take, or become interested in for his own benefit any such stock, share, debenture stock, debenture bond, or other security; and if any such stock, share, debenture stock, debenture bond, or other security, or any interest therein, shall come to or vest in such Commissioner by will or succession, for his own benefit, he shall within three calendar months after the same shall so come to or vest in him absolutely sell and dispose of the same or his interest therein.

It shall not be lawful for the Commissioners, except by consent of the parties to the proceedings, to exercise any jurisdiction by this act conferred upon them in any case in which they shall be, directly or indirectly, interested in the matter in question.

The Commissioners shall devote the whole of their time to the performance of their duties under this act, and shall not accept or hold any office or employment inconsistent with this provision.

TRANSFER TO COMMISSIONERS OF JURISDICTION UNDER 17 AND 18 VICT. C. 31, S. 3.

6. Any person complaining of anything done or of any omission made in violation or contravention of section 2 of the Railway and Canal Traffic Act, 1854, or of section 16 of the Regulation of Railways Act, 1868, or of this act, or of any enactment amending or applying the said enactments respectively, may apply to the commissioners, and upon the certificate of the board of trade alleging any such violation or contravention, any person appointed by the Board of Trade in that behalf may in like manner apply to the Commissioners; and for the purpose of enabling the Commissioners to hear and determine the matter of any such complaint, they shall have and may exercise all the jurisdiction conferred by section 3 of the Railway and Canal Traffic Act, 1854, on the several courts and judges empowered to hear and determined complaints under that act; and may make orders of like nature with the writs and orders authorized to be issued and made by the said courts and judges; and the said courts and judges shall, except for the purpose of enforcing any decision or order of the Commissioners, cease to exercise the jurisdiction conferred on them by that section.

POWER FOR COMMISSIONERS TO ENABLE COMPANIES TO EXPLAIN ALLEGED VIOLATION OF LAW.

7. Where the Commissioners have received any complaint alleging the infringement by a railway company or canal company of the provisions of any enactment in respect of which the Commissioners have jurisdiction, they may, if they think fit, before requiring or permitting any formal proceedings to be taken on such complaint, communicate the same to the company against whom it is made, so as to afford them an opportunity of making such observations thereon as they may think fit.

DIFFERENCES BETWEEN RAILWAY AND CANAL COMPANIES TO BE REFERRED TO COMMISSIONERS.

8. Where any difference between railway companies or between canal companies, or between a railway company and a canal company, is, under the provisions of any general or special act, passed either before or after the passing of this act, required or authorized to be referred to arbitration, such difference shall at the instance of any company party to the difference, and with the consent of the Commissioners be referred to the Commissioners for their decision in lieu of being referred to arbitration: provided that the power of compelling a reference to the Commissioners in this section contained shall not apply to any case in which any arbitrator has in any general or special act been designated by his name or by the name of his office, or in which, a standing arbitrator having been appointed under any general or special act, the Comissioners are of opinion that the difference in question may more conveniently be referred to him.

POWER TO REFER DIFFERENCES TO COMMISSIONERS.

9. Any difference to which a railway company or canal company is a party, may, on application of the parties to the difference, and with the assent of the Commissioners, be referred to them for their decision.

10. The following powers and duties of the Board of Trade shall be transferred to the Commissioners, namely:

TRANSFER TO COMMISSIONERS OF CERTAIN POWERS AND DUTIES OF THE BOARD OF TRADE, 26 AND 27 VICT. C. 92.

(1) The powers of the Board of Trade under Part III. of the Railway Clauses Act, 1863, or under any special act, with respect to the approval of working agreements between railway companies; and,

(2) The powers and duties of the Board of Trade under section thirty-five of the Railway Clauses Act, 1863, with respect to the exercise by railway companies of their powers in relation to steam vessels:

And the provisions of the said acts conferring such powers or imposing such duties, or otherwise referring to such powers or duties, shall so far as is consistent with the tenor thereof, be read as if the Commissioners were therein named instead of the Board of Trade.

Explanation and Amendment of Law.

Explanation of 17 and 18 Vict. c. 31, s. 2, as to through traffic.

11. Whereas by section 2 of the Railway and Canal Traffic Act, 1854, it is enacted that every railway company and canal company and railway and canal company shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats, and other vehicles; and that no such company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatsoever, or shall subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; and that every railway company and canal company and railway and canal company having or working railways or canals which form a part of a continuous line of railway, or canal or railway and canal communication, or which have the terminus, station, or wharf of the one near the terminus, station, or wharf of the other, shall afford all due and reasonable facilities for receiving and forwarding by one of such railways or canals all the traffic arriving by the other, without any unreasonable delay, and without any such preference or advantage or prejudice or disadvantage as aforesaid, and so that no obstruction may be offered to the public desirous of using such railways or canals or railways and canals as a continuous line of communication, and so that all reasonable accommodation may by means of the railways and canals of the several companies be at all times afforded to the public in that behalf:

And whereas it is expedient to explain and amend the said enactment: be it therefore enacted, that—

Subject as hereinafter mentioned, the said facilities to be so afforded are hereby declared to and shall include the due and reasonable receiving, forwarding, and delivering by every railway company and canal company, and railway and canal company at the request of any other such company of through traffic to and from the railway or canal of any other such company at through rates, tolls, or fares (in this act referred to as through rates).

Provided as follows:—

(1) The company requiring the traffic to be forwarded shall give written notice of the proposed through rate to each forwarding company, stating both its amount and its apportionment, and the route by which the traffic is proposed to be forwarded:

(2) Each forwarding company shall, within the prescribed period after the receipt of such notice, by written notice inform the company requiring the traffic to be forwarded whether they agree to the rate and route; and, if they object to either, the grounds of the objection:

(3) If at the expiration of the prescribed period no such objection has been sent by any forwarding company, the rate shall come into operation at such expiration:

(4) If an objection to the rate or route has been sent within the prescribed period, the matter shall be referred to the Commissioners for their decision:

(5) If an objection be made to the granting of the rate or to the route, the Commissioners shall consider whether the granting of the rate is a due and reasonable facility in the interest of the public, and whether, having regard to the circumstances, the route proposed is a reasonable route, and shall allow or refuse the rate accordingly:

(6) If the objection be only to the apportionment of the rate, the rate shall come into operation at the expiration of the prescribed period, but the decision of the commissioners as to its appointment shall be retrospective; in any other case the operation of the rate shall be suspended until the decision is given:

(7) The Commissioners in apportioning the through rate shall take into consideration all the circumstances of the case, including any special expense incurred in respect of the construction, maintenance, or working of the route, or any part of the route, as well as any special charges which any company may have been entitled to make in respect thereof:

(8) It shall not be lawful for the Commissioners in any case to compel any company to accept lower mileage rates than the mileage rates which such company may for the time being legally be charging for like traffic carried on by a like mode of transit on any other line of communication between the same points, being the points of departure and arrival of the through route:

(9) The prescribed period mentioned in this section shall be ten days, or such longer period as the Commissioners may from time to time by general order prescribe.

Where a railway company or canal company use, maintain, or work, or are party to an arrangement for using, maintaining, or working steam vessels for the purpose of carrying on a communication between any towns or ports, the provisions of this section shall extend to such steam vessels, and to the traffic carried thereby.

POWERS OF COMMISSIONERS AS TO THROUGH RATES.

12. Subject to the provisions in the last preceding section contained, the Commissioners shall have full power to decide that any proposed through rate is due and reasonable, notwithstanding that a less amount may be allotted to any forwarding company out of such through rate than the maximum rate such company is entitled to charge, and to allow and apportion such through rate accordingly.

PROVISION FOR COMPLAINTS BY PUBLIC AUTHORITY IN CERTAIN CASES.

13. A complaint of a contravention of section 2 of the Railway and Canal Traffic Act, 1854, as amended by this act, may be made to the Commissioners by a municipal or other public corporation, local or harbor board, without proof that the

complainants are aggrieved by the contravention: provided that a complaint shall not be entertained by the commissioners in pursuance of this section, unless such complaint is accompanied by a certificate of the Board of Trade to the effect that in their opinion the case in respect of which the complaint is made is a proper one to be submitted for adjudication to the Commissioners by such municipal or other public corporation, local or harbor board.

PUBLICATION OF RATES.

14. Every railway company and canal company shall keep at each of their stations and wharves a book or books showing every rate for the time being charged for the carriage of traffic, other than passengers and their luggage, from that station or wharf to any place to which they book, including any rates charged under any special contract, and stating the distance from that station or wharf of every station, wharf, siding, or place to which any such rate is charged. Every such book shall during all reasonable hours, be open to the inspection of any person without the payment of any fee.

The Commissioners may from time to time, on the application of any person interested, make orders with respect to any particular description of traffic, requiring a railway company or canal company to distinguish in such book how much of each rate is for the conveyance of the traffic on the railway or canal, including therein tolls for the use of the railway or canal, for the use of carriages or vessels, or for locomotive power, and how much is for other expenses, specifying the nature and detail of such other expenses.

Any company failing to comply with the provisions of this section shall for each offence, and in the case of a continuing offence, for every day during which the offence continues, be liable to a penalty not exceeding five pounds, and such penalty shall be recovered and applied in the same manner as penalties imposed by the Railways Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation (Scotland) Act, 1845 (as the case may require), are for the time being recoverable and applicable.

POWER TO COMMISSIONERS TO FIX TERMINAL CHARGES.

15. The Commissioners shall have power to hear and determine any question or dispute which may arise with respect to the terminal charges of any railway company, where such charges have not been fixed by any act of parliament, and to decide what is a reasonable sum to be paid to any company for loading and unloading, covering collection, delivery, and other services of a like nature; any decision of the Commissioners under this section shall be binding on all courts and in all legal proceedings whatsoever.

ARRANGEMENTS BETWEEN RAILWAY COMPANIES AND CANAL COMPANIES.

16. No railway company or canal company, unless expressly authorized thereto by any act passed before the passing of this act, shall, without the sanction of the Commissioners, to be signified in such manner as they may by general order or otherwise direct, enter into any agreement whereby any control over, or right to interfere in, or concerning the traffic carried or rates or tolls levied on any part of a canal is given to the railway company, or any persons managing or connected with the management of any railway; and any such agreement made after the commencement of this act without such sanction shall be void.

The Commissioners shall withold their sanction from any such agreement which is in their opinion prejudicial to the interests of the public.

Not less than one month before any such agreement is so sanctioned, copies of the intended agreement certified under the hand of the secretary of the railway company or one of the railway companies party or parties thereto, shall be deposited for public inspection at the office of the Commissioners, and also at the office of the clerk of the peace of the county, riding, or division in England or Ireland in which the head office of any canal company party to the agreement is situate, and at the office of the principal sheriff clerk of every such county in Scotland, and notice of the intended agreement, setting forth the parties between

whom, or on whose behalf, the same is intended to be made, and such further particulars with respect thereto as the Commissioners may require shall be given by advertisement in the London, Edinburgh, or Dublin "Gazette," according as the head office of any canal company party to the agreement is situate in England, Scotland, or Ireland, and shall be sent to the secretary or principal officer of every canal company any of whose canals communicates with the canal of any company party to the agreement; and shall be published in such other way, if any, as the Commissioners for the purpose of giving notice to all parties interested therein by order direct.

MAINTENANCE OF CANALS BY RAILWAY COMPANIES.

17. Every railway company owning or having the management of any canal or part of a canal shall at all times keep and maintain such canal or part, and all the reservoirs, works and conveniences thereto belonging, thoroughly repaired and dredged and in good working condition, and shall preserve the supplies of water to the same so that the whole of such canal or part may be at all times kept open and navigable for the use of all persons desirous to use and navigate the same without any unnecessary hindrance, interruption, or delay.

Conveyance of Mails.

CONVEYANCE OF MAILS.

18. Every railway company shall convey by any train all such mails as may be tendered for conveyance by such train, whether such mails be under the charge of a guard appointed by the postmaster general or not, and notwithstanding that no notice in writing requiring mails to be conveyed by such train has been given to the company by the postmaster general.

Every railway company shall afford all reasonable facilities for the receipt and delivery of mails at any of their stations without requiring them to be booked or interposing any other delay.

Where the mails are in charge of a guard appointed by the

postmaster general, every railway company shall permit such guard, if he think fit, to receive and deliver them at any station by himself or his assistants, rendering him nevertheless such aid as he may require.

REMUNERATION FOR CONVEYANCE OF MAILS.

19. Every railway company shall be entitled to reasonable remuneration for any services performed by them in pursuance of this act with respect to the conveyance of mails, and such remuneration shall be paid by the postmaster general. Any difference between the postmaster general and any railway company as to the amount of such remuneration, or as to any other question arising under this act, shall be decided by arbitration in manner provided by the act of the session of the first and second years of the reign of her present Majesty, chapter ninety-eight, or, at the option of such railway company, by the Commissioners.

CONVEYANCE OF MAILS ON STEAM VESSELS.

20. Where a railway company use, maintain or work, or are party to any arrangement for using, maintaining, or working steam vessels for the purpose of carrying on a communication between any towns or ports, all provisions contained in any act with respect to the conveyance of mails by railways shall, so far as they are applicable to the conveyance of mails by steam vessels, extend to the steam vessels so used, maintained, or worked.

Regulations as to Commissioners.

ASSISTANT COMMISSIONERS.

21. The Assistant Commissioners shall be subject to the orders of the Commissioners, and shall make such inquiries and reports and perform such other acts and services as the Commissioners may direct; and it shall be lawful for such Assistant Commissioners, or either of them, to undertake such arbitration under the act as the Commissioners, with the consent of the parties to such arbitration, may direct; and the said Assistant Commissioners, for the purposes of such in-

quiries, reports, and arbitrations, shall have and may exercise all powers of entry, inspection, summoning and examining witnesses, requiring the production of documents, and administering an oath by this act conferred upon the commissioners.

SALARY OF COMMISSIONERS.

22. There shall be paid to each of the Commissioners such salary, not exceeding three thousand pounds a year, and to each Assistant Commissioner such salary, not exceeding fifteen hundred pounds a year, as the treasury determine.

The salaries and expenses of the Commissioners and of their officers and of the Assistant Commissioners shall be paid out of the moneys to be provided by parliament.

ASSESSORS.

23. The Commissioners may from time to time, in the exercise of any jurisdiction in this act conferred on them, with the consent of the treasury, call in the aid of one or more assessors, who shall be persons of engineering or other technical knowledge. There shall be paid to such assessors such remuneration as the treasury, upon the recommendation of the Commissioners, may direct.

APPOINTMENT OF OFFICERS.

24. The Bommissioners may from time to time appoint such officers and clerks with such salaries as the Commissioners, with the sanction of the treasury, think fit.

POWERS OF COMMISSIONERS.

25. For the purposes of this act the Commissioners shall, subject as in this act mentioned, have full power to decide all questions, whether of law or of fact, and shall also have the following powers; that is to say,

(*a*) They may, by themselves or by any person appointed by them to prosecute an inquiry, enter and inspect any place or building, being the property or under the control of any railway or canal company, the entry or inspection of which appears to them requisite;

(*b*) They may require the attendance of all such persons as they may think fit to call before them and examine, and may require answers or returns to such inquiries as they think fit to make;

(*c*) They may require the production of all books, papers, and documents relating to the matters before them;

(*d*) They may administer an oath;

(*e*) They may, when sitting in open court, punish for contempt in like manner as if they were a court of record.

Every persons required by the Commissioners to attend as a witness shall be allowed such expenses as would be allowed to a witness attending on subpœna before a court of record; and in case of dispute as to the amount to be allowed, the same shall be referred to a master of one of the superior courts, who, on request, under the hands of the Commissioners, shall ascertain and certify the proper amount of such expenses.

ORDERS OF COMMISSIONERS.

26. Any decision or any order made by the Commissioners for the purpose of carrying into effect any of the provisions of this act may be made a rule or order of any superior court, and shall be enforced either in the manner directed by section three of the railway and Canal Traffic Act, 1854, as the writs and orders therein mentioned, or in like manner as any rule or order of such court..

For the purposes of carrying into effect this section, general rules and orders may be made by any superior court in the same manner as general rules and orders may be made with respect to any other proceedings in such court.

The Commissioners may review and rescind or vary any decision or order previously made by them or any of them.

The Commissioners shall, in all proceedings before them under sections 6, 11, 12, and 13 of this act, and may, if they think fit, in all other proceedings before them under this act, at the instance of any party to the proceedings before them, and upon such security being given by the appellant as the Commissioners may direct, state a case in writing for the opinion

of any superior court determined by the Commissioners upon any question which, in the opinion of the Commissioners, is a question of law.

The court to which the case is transmitted shall hear and determine the question or questions of law arising thereon, and shall thereupon reverse, affirm, or amend the determination in respect of which the case has been stated, or remit the matter to the Commissioners with the opinion of the court thereon, or make such other order in relation to the matter, and make such order as to costs as to the court may seem fit, and all such orders shall be final and conclusive on all parties: provided that the Commissioners shall not be liable to any costs in respect or by reason of any such appeal.

The operation of any decision or order made by the Commissioners shall not be stayed pending the decision of any such appeal, unless the Commissioners shall otherwise order.

Save as aforesaid, every decision and order of the Commissioners shall be final.

SITTINGS OF COMMISSIONERS.

27. The Commissioners shall sit at such times and in such places and conduct their proceedings in such manner as may seem to them most convenient for the speedy dispatch of business; they may, subject as in this act mentioned, sit either together or separately, and either in private or open court, but any complaint made to them shall, on the application of any party to the complaint, be heard and determined in open court.

COSTS.

28. The costs of and incidental to any proceeding before the Commissioners shall be in the discretion of the Commissioners.

POWER OF COMMISSIONERS TO MAKE GENERAL ORDERS.

29. The Commissioners may at any time after this act and from time to time make such general orders as may be requisite for the regulation of proceedings before them, including applications for and the stating of cases for appeal,

and also for prescribing, directing, or regulating any matter which they are authorized by this act to prescribe, direct or regulate by general order, and also for enabling the Commissioners in cases to be specified in such general orders to exercise their jurisdiction by any one or two of their number: provided, that any person aggrieved by any decision or order made in any case so specified may require a rehearing by all the Commissioners; they may further make regulations for enabling them to carry into effect the provisions of this act, and may from time to time revoke and alter any general orders or regulations made in pursuance of this act. Every general order, and every alteration in a general order, made in pursuance of this section shall be submitted to the lord chancellor for approval, and shall not come into force until it shall be approved by him.

Every general order purporting to be made in pursuance of this act shall, immediately after the making thereof, be laid before both houses of parliament, if parliament be then sitting, or if parliament be not then sitting, within seven days after the then next meeting of parliament, and if either house of parliament by a resolution passed within two months after such general order has been so laid before the said house, resolve that the whole or any part of such general order ought not to continue in force, the same shall after the date of such resolution cease to be of any force, without prejudice nevertheless to the making of any general order in its place, or to anything done in pursuance of such general order before the date of such resolution; but, subject as aforesaid, every general order purporting to be made in pursuance of this act shall be deemed to have been duly made and within the powers of this act, and shall have effect as if it had been enacted in this act.

EVIDENCE OF DOCUMENTS.

30. Every document purporting to be signed by the Commissioners, or any of them, shall be received in evidence without proof of such signature, and until the contrary is proved shall be deemed to have been so signed and to have been duly executed or issued by the Commissioners.

COMMISSIONERS TO MAKE ANNUAL REPORTS.

31. The Commissioners shall, once in every year, make a report to her Majesty of their proceedings under this act during the past year, and such report shall be laid before both houses of parliament within fourteen days after the making thereof if parliament is then sitting, and if not, then within fourteen days after the next meeting of parliament.

MISCELLANEOUS.

DETERMINATION OF FEES.

32. The Commissioners may, at any time after the passing of this act, by general order with the concurrence of the treasury, appoint the fees to be taken in relation to proceedings before them, and may from time to time, by general order, with the like concurrence of the treasury, appoint the fees to be taken in relation to proceedings before them, and may from time to time, by general order, with the like concurrence, increase, reduce, or abolish all or any of such fees, and appoint new fees to be taken in relation to such proceedings.

COLLECTION OF FEES.

33. The Public Offices Fees Act, 1866, shall apply to all fees taken in relation to any proceedings before the Commissioners.

Any fee or payment in the nature or lieu of a fee paid in respect of any proceedings before the Commissioners and collected otherwise than by means of stamps shall be paid into the receipt of her Majesty's exchequer in such manner as the treasury from time to time direct, and carried to the consolidated fund.

TAXATION OF COSTS.

34. The costs, charges, and expenses of and incidental to any proceedings before the Commissioners which are incurred by any person, shall, if required, be taxed in the same manner and by the same persons as if such proceedings were proceedings in a Superior Court.

NOTICES—HOW TO BE GIVEN.

35. Any notice required or authorized to be given under this act may be in writing or in print, or partly in writing and partly in print, and may be sent by post, and if sent by post shall be deemed to have been received at the time when the letter containing the same would have been delivered in the ordinary course of the post; and in proving such sending it shall be sufficient to prove that the letter containing the notice was prepaid and properly addressed and put into a post-office.

APPLICATION OF ACT TO SCOTLAND.

36. In the application of this act to Scotland—

(1) The term "attending on subpœna before a court of record" means attending on citation the court of justiciary:

(2) The Queen's and lord-treasurer's remembrancer shall perform the duties of a master of one of the superior courts under this act.

Temporary Provisions.

DURATION OF OFFICE AND POWERS OF COMMISSIONERS.

37. This act shall continue in force for five years next after the passing of this act, and thenceforth until the end of the then next session of parliament, but the expiration of this act shall not affect the validity of anything done before such expiration.

DIGEST OF CASES.

ACCOMMODATION OF TRAFFIC—*Booking Office.*—A railway company are not bound to provide booking offices for traffic at places off their railway, nor to arrange for the conveyance by road of goods between such places to the nearest station on their railway. Dublin and Meath R. Co. *v.* Midland Great Western of Ireland R. Co., 3 Nev. & Mac. 379.

Cars—Construction of Special Acts—Pullman Sleeping-car—Similar Facilities.—The C. Co, were bound to afford to Scottish East Coast Traffic of the N. B. Co. using their railway all usual facilities, including, so far as might reasonably be required, through carriages, and also any greater facilities which they might grant to any other company in respect of such traffic, or of any traffic competitive with it. The C. Co. ran for the convenience of traffic competitive with the Scottish East Coast traffic of the N. B. Co. in one case a saloon sleeping-carriage, weighing three tons, and fitted to carry twelve persons; and in another a composite carriage, of which one compartment had sleeping-berths for three persons. *Held*, that a Pullman car, weighing twenty-one tons, and to hold twenty-two persons, was so dissimilar in character, both to the saloon and composite carriages, that the N. B. Co. were not entitled under the above provisions to insist on the forwarding of it by the C. Co. as a similar facility, nor as a reasonable requirement, unless the N. B. Co. guaranteed to the C. Co. a mileage proportion on eight fares. Caledonian *v.* North British R. Co. (No. 3), 3 Nev. & Mac. 56.

Cars—Special Act, Construction of—Supply of Wagons—Private Sidings.—The A railway company exclusively worked and managed the B railway as lessees of the line, under a special act which provided that the A company "shall provide and employ all such locomotive powers, engines, carriages, wagons, and other rolling stock, plant, stores, materials, and labor, as shall be proper and sufficient for the working and user of the demised undertaking, and the reception, accommodation, conveyance, and delivery by the A company of the traffic thereof, and the B company shall not be bound to provide any such thing." Upon refusal by the A company to provide wagons for the traders' traffic on the B railway.

ACCOMODATION OF TRAFFIC—*Continued.*

Held, by the Common Pleas Division of the High Court of Justice (affirming the judgment of the railway commissioners) that the special act imposed an obligation on the A company to provide wagons proper and sufficient for the working and user of the B railway, and that any one interested in procuring that accommodation had a ground of complaint under section 2 of the Railway and Canal Traffic Act, 1854, against the A company if they refused to provide it. *Semble*, that the A company were not bound under the special act to provide wagons on private sidings connected with the B railway. Watkinson and Others *v.* Wrexham, Mold and Connah's Quay R. Co. (No. 2) 3 Nev. & Mac. 164.

Cars—Supply of—Special Act.—The Railway and Canal Traffic Act, 1854, s. 2, requires facilities to be given according to the powers of railway companies, and as special railway acts make the powers of some companies larger than those of others, so they also extend or limit the facilities they give to the public, and thus the general enactment as to affording facilities has to be read and considered with reference to the language of any special clauses regarding them.

A railway was transferred to a railway company under a special act, sec. 15 of which provided that the railway company, when requested so to do by any persons occupying works or manufactories adjacent to and having sidings connected with the railway transferred, was at all reasonable times and with all due diligence to provide wagons proper and sufficient for the conveyance of all traffic passing exclusively on the lines of railway transferred. Upon complaint by persons occupying works or manufactories adjacent to the railway, that the railway company did not supply sufficient wagons for the traffic on the railway, *held*, that although the duty cast upon the railway company by the special act was limited to cases where there was a request for wagons by members of a particular class, and where also only particular lines of railway were required to be used, yet where the duty did arise, it determined what was a reasonable facility within the meaning of sec. 2 of the Railway and Canal Traffic Act, 1854, as effectively as if it were a duty of a more general kind or one which applied under any circumstances; and the railway company were enjoined to afford all reasonable facilities for the receiving, forwarding, and delivery of the applicants' ore passing exclusively over the lines transferred, having regard to the above section. Tharsis Sulphur and Copper Co. and Others *v.* London & Northwestern R. Co., 3 Nev. & Mac. 455.

Cars.—A railway company provided wagons to traders who loaded and unloaded on their own premises, and who hauled the wagons to and from the station for that purpose at their own expense. *Held*, that some remuneration was due to the railway company for their wagons being used elsewhere than upon their premises, and that a reasonable sum to be paid to them would be an amount not exceeding 1*d.* per ton. Aberdeen Line Co. *v.* Great North of Scotland R. Co., 3 Nev. & Mac. 205.

Collection and Delivery of Traffic— Weighing Coal.—Upon complaint by

ACCOMMODATION OF TRAFFIC—*Continued.*

traders whose collieries and brickworks were connected by sidings with the respondents' railway that the respondents did not duly and properly work and manage their railway, and did not provide sufficient locomotive power for that purpose, and that they improperly and unnecessarily detained empty wagons destined for the colliers, and works of the applicants, and failed to haul away with regularity and despatch from the sidings connecting the said works and collieries with the railway, loaded wagons placed ready for removal; the commissioners held that the respondents did not, according to their powers, afford all reasonable facilities for the receiving, and forwarding, and delivering of traffic upon and from their railway, and for the return of carriages and trucks; and the commissioners ordered the respondents to work and manage their railway duly and properly, and to provide sufficient locomotive power and labor for that purpose, and to desist from unduly detaining empty or unloaded wagons destined for the collieries and works of the applicants, and to haul away with regularity and despatch from the sidings communicating with their railway loaded wagons properly placed ready for removal. *Quære:* whether if a railway company is bound by its special act to weigh coal at the point of discharge, such weighing is a facility for delivery under the Railway and Canal Traffic Act, 1854, s. 2. Watkinson and others *v.* Wrexham, Mold and Connah's Quay R. Co. (No. 3) 3 Nev. & Mac. 446.

Collection of Traffic.—A railway company worked a line for the carriage of minerals, which was connected with collieries by junctions and private sidings. The company had no power to make a terminal charge for services at the junctions of their line with the sidings. The company's trains called for trucks standing in the different sidings. At each junction the engine was detached, and ran off the main line into the siding beyond the company's lands, from which it drew out any trucks ready to start and attached them to the train. The engine had, besides, frequently to perform shunting and marshalling, so as to pick out of a number of trucks, full and empty, such as were to be added to the train. The railway company charged for the work done on the siding a fixed sum of 3*d.* per ton, in addition to the mileage rate for conveyance on the railway company's own line. *Held*, that the company were not entitled to make such charge, and that as the plan of each siding, as well as its junction, had received the approval of the engineer of the railway company, the owners of the sidings did all that was necessary to entitle them to have their traffic taken by the railway company at the mileage rate, and free of any charge for terminal services, if they placed their trucks as near to the junctions as they could be brought with safety to the main line, arranged in proper order, and clear of any obstacles to their being moved away. A railway company give only a reasonable facility in running over a portion of a foreign line to collect traffic, properly placed for that purpose, where such line has been conveniently planned for their having access to it, and where they have no reserve line of their own. Watkinson *v.* Wrexham, etc., R. Co. (No. 1), 3 Nev. & Mac. 5.

ACCOMMODATION OF TRAFFIC—*Continued.*

Continuous Line of Railway—Forwarding Traffic—Coal Traffic.—The obligation imposed upon every railway company to afford all due and reasonable facilities for receiving and forwarding by its railway traffic coming by another, which forms with it a continuous line of communication, is not limited to the cases in which a railway company has accommodation to take over such traffic at the point of junction. Upon complaint, by the lessees of a colliery, situated on the N. & B. R., at a short distance from its junction with the M. R. to S., that they were prevented sending the traffic of their colliery to S. by the railways of the two companies, which formed a direct route, and in consequence had to send it by a circuitous route, it was proved that the two railways formed a continuous line of communication, and that, physically, there was no difficulty in the traffic of the colliery being carried to S. by the direct route. *Held*, that the applicants were entitled, under section 2 of the Railway and Canal Traffic Act, 1854, to have their traffic conveyed by any route they pleased, and to use the two railways as if they were one continuous line. Victoria Coal and Iron Co. *v.* Midland and Breath and Brecon R. Cos., 3 Nev. & Mac. 37.

Continuous Line of Railway—Forwarding Traffic—Passenger Traffic.—Two railway companies ran trains to C, and each had a station there. The stations were 55 chains apart, but were connected by a line of railway belonging to one of such railway companies. Upon complaint by the inhabitants of the district that no passengers were conveyed on the railway between the two stations, although there was a continuous line of railway, the commissioners made an order enjoining both the companies to afford a continuous communication for passengers by means of their continuous lines, and to afford due and reasonable facilities for forwarding through passenger traffic arriving by one of the lines at C by the other. James and others *v.* Taff, Vale, and Great Western R. Co., 3 Nev. & Mac. 540.

Delivery of Traffic—Damagable Goods Traffic—Delivery at Particular Station.—A railway company is under the same obligations as a common carrier, undertaking to carry in accordance with the provisions of the Railway and Canal Traffic Act, 1854; therefore questions as to how far a sender of goods may require delivery at any station he may appoint, or as to how far a railway company is liable to carry goods of every kind, or for all persons alike, are to be determined in each case, not with reference to what a railway company may choose to do, or may ordinarily do, but with reference to what may be within its powers, and at the same time a reasonable requirement. A railway company delivered minerals at T. station, but refused to deliver their damagable traffic consigned to the applicant, and delivered such traffic at L., one mile and a half from T., which was their general goods station for T. The accommodation at T. station being insufficient to receive all the T. goods traffic, and the railway company having no power to enlarge it, *held*, that the applicant was not entitled to have damagable goods delivered at that station. *Semble*, if the accommodation

ACCOMMODATION OF TRAFFIC—*Continued.*

at T. station had been sufficient to receive all traffic similarly sent, the company would have been ordered to deliver damagable goods to the applicant at T. station. Thomas *v.* North Staffordshire R. Co., 3 Nev. & Mac. 1.

Station Accommodation—Passengers and Goods—Due and Reasonable Facilities.—The obligation imposed upon railway companies by section 2 of the Railway and Canal Traffic Act, 1854, to afford to the public facilities for using a railway as regards the receipt and delivery of traffic is not confined to the granting of such facilities at existing stations only. Upon complaint by the inhabitants of the district of N., which was intersected by a line of railway, of there being no station in the district it was proved that there was no station nearer than at A. on the one side and the terminal station of H. on the other, the distance from A. to H. being about four and a half miles; that the railway company possessed surplus and unoccupied lands in such district, upon part of which they had placed a siding for the delivery of coal, and that there would be no physical or engineering difficulty in using part of such land for the establishment of a station at which traffic of every description could be dealt with. *Held*, that the railway company had not contravened the provisions of section 2 of the Railway and Canal Traffic Act, 1854, by omitting to provide a passenger station in the district, because it appeared that the number of passengers that would use such a station would be so limited that the saving to so few persons of the inconvenience of going an extra distance by road between their houses and the H. station was not a prospective gain from the point of view of public interest sufficient in degree to justify the commissioners in requiring the railway company to open a passenger station in the district of N., but that the railway company ought to provide siding accommodation reasonably sufficient for the receipt and delivery in N. of the station-to-station traffic of the district, and to give such a service for the delivery of inward traffic in the district, and the removal therefrom of outward traffic, as was given under corresponding circumstances to other places. Local Board for District of Newington *v.* North-eastern R. Co. 3 Nev. and Mac. 306, and see Southwestern R. Co. *v.* Staines R. Co., 3 Nev. & Mac. 48, 306.

Station Accommodations—Order for Railway Company to Erect or Alter Stations and other Structural Works.—The railway commissioners have, under the Railway and Canal Traffic Act, 1854, jurisdiction to hear and determine a complaint against a railway company of not, according to its powers, affording all reasonable facilities for receiving, forwarding, and delivering passengers and other traffic at and from any of its stations which are used by the company for such passengers or other traffic; and although the commissioners have no jurisdiction to order the company to make a new railway station, or to order any particular works, or otherwise to interfere with the discretion of the company in the mode of performing its obligation to afford such facilities, according to its powers, for the re-

ACCOMMODATION OF TRAFFIC—*Continued.*

ceiving, forwarding, and delivering of the traffic, yet they have jurisdiction to order such facilities, even if their doing so would necessitate the making by the company of some structural alterations of such station. A complaint was made to the railway commissioners under section 2 of the Railway and Canal Traffic Act, 1854, by the corporation of H. as to the condition of the stations of the Southeastern R. Co. at H. and L., and an application was made for an order requiring the railway company to enlarge the station at H., to provide a better booking-office, waiting-room, refreshment-room, and general accommodation therein; to alter the existing platforms, and to provide new ones; to improve the warehouse and cattle accommodation; and at L. to enlarge the platform, and to provide a new road of approach. The commissioners delivered a judgment setting out the order which they proposed to make. This order required the railway company to extend the platform accommodation at H. according to a specified plan, to cover over the platforms and part of the carriage-yard, to add four waiting-rooms of a specified size, to reserve a portion of the station for refreshments, to increase the accommodation for the delivery of tickets, and to increase and improve the accommodation for cattle. With respect to the station at L., the order required the company to increase and improve the platform and waiting-room accommodation, to cover over the bridge, and to make fresh openings into and to widen the road of approach to that station. *Held*, by the Court of Appeal (reversing the judgment of the Queen's Bench Division), that the subject-matter of the complaint and application was not beyond the scope of the jurisdiction of the commissioners, but that the commissioners had no power peremptorily to order particular works to be executed according to a specified plan. By Lord Selborne, L. C., and Lord Coleridge, C. J.: That the orders with respect to the platforms and goods yard at H., and the approach road at L., were in excess of jurisdiction; that the orders as to refreshment accommodation and the covering over of platforms, carriage-yard and bridge were not "facilities" within the statute; but that the orders as to booking-office, waiting-room, and cattle accommodation were such facilities.

By Brett, L. J.: That all the orders except those relating to the cattle accommodation and the delivery of tickets at the booking-office were in excess of jurisdiction. Southeastern R. Co. *v.* Railway Commissioners and Corporation of Hastings, 3 Nev. & Mac. 464.

ACCOMMODATION.—See Taff Vale R. Co. *v.* Rhymney R. Co., 2 Nev. & Mac. 176.

ACCOMMODATION TO BE GRANTED BY RAILWAY COMPANIES.—See 1 Nev. & Mac. 45, *n.* 6.

ACTION FOR REFUSING TO CARRY GOODS.—An action on the case lies against a common carrier for refusing to carry goods if he has conveniences to do so. Jackson *v.* Rogers, 2 Show. 330.

ACTION.—*Who may maintain action for overcharge.*—One with whom

ACTION—*Continued.*

a contract for the carriage of goods is made, and who is described therein as the consignor, consignee, and sole owner, may maintain an action to recover an overcharge exacted by the carrier as a condition of the delivery of the goods, although he was not, in fact, the owner, and did not personally furnish and pay the overcharge. The plaintiff in such case is "a trustee of an express trust" within the meaning of sec. 2607, Rev. St. of Wisconsin. Watterman *v.* Chicago, etc., R. Co. (Wis. Nov. 1884), 18 Am. & Eng. R. R. Cas. 486.

ADEQUATE CONSIDERATION.—See Nicholson *v.* Great Western R. Co. (No. 1), 1 Nev. & Mac. 121.

ADMISSION OF CARRIER'S VANS INTO STATION.—*Cartage—Reviewing previous decisions.*—A. collected parcels and forwarded them by railway; the railway company refused to admit A.'s vans into their station after 6.30 P.M., but admitted their own vans and those of B. at a later hour with parcels which they forwarded the same night. The time (6.30 P.M.) fixed by the company as that after which they would not receive goods to be forwarded the same night was reasonable. The company in admitting their own vans later, acted *bona fide*, and not with the intention of gaining undue advantage over the collecting carriers; they admitted B.'s vans in consequence of an injunction obtained by him. In two similar cases—Garton *v.* Bristol & Exeter R. Co. and Baxendale *v.* South Western R. Co.—injunctions under the Railway and Canal Traffic Act, 1854, had been granted by the court to restrain those companies from admitting their own vans into their station with goods to be despatched the same night at a later hour than those of other persons. On an application by A. for a similar injunction against the present defendants: *Held* (by Erle, C. J., and Montague Smith, J.), that the exercise of this special jurisdiction by the court being subject to no review, and depending in each instance on the special facts of the case, previous decisions under it are not binding on the court in the same manner that precedents in law are binding; and that the injunction prayed would interfere with the transport of traffic, which it was the object of the legislature to facilitate, and that it ought not to be granted. *Held* (by Willes and Keating, JJ.), that the above cases were precedents binding on the court, and also were rightly decided; and that the injunction ought to be granted. Palmer *v.* London & South Western R. Co., 1 Nev. & Mac. 243.

Cartage—Special agreement.—Competition.—A railway company has no right to impose a charge for the conveyance of goods to or from their station where the customer does not require such service to be performed by them. A railway company refused to receive goods sent to their station by the public generally after a quarter past five o'clock P.M. to be forwarded by the goods train which left such station on the same night, but they received goods for the same train brought there by there agent W. as late as eight o'clock P.M. W. had a receiving office for goods about a mile from

ADMISSION OF CARRIER'S VANS INTO STATION—*Continued.*

the station, where he weighed, classified, and prepared the goods for loading, which would otherwise have had to be done at the station, and but for which having been so previously done, the goods could not generally have been received at the station at so late an hour. On the goods so received at such receiving office, W. made a charge for conveying them to the station, in addition to the company's usual rates of charge for carriage upon the railway. *Held*, that the facility so given to W. for forwarding goods after the station was closed to others was an undue prejudice to those who did not wish to have their goods conveyed for them to the station. A preference with respect to a reduced rate of carriage of certain goods given by a railway company to certain individuals, in consideration of their contracting to have all such goods consigned to them through the railway, and not by water or other means, is an undue preference by the Railway and Canal Traffic Act, 1854, unless it be clearly shown that it is done in order to prevent a competition with the railway, or that there is secured thereby to the company such an amount of traffic as to compensate for making the reduced rate. Garton *v.* Bristol & Exeter R. Co., 1 Nev. & Mac. 218.

Cartage—Undue Preference of themselves by a Company—Costs.—Injunction against a railway company under the Railway and Canal Traffic Act, 1854, to restrain them from requiring other carriers to bring their goods to the railway station at an earlier hour than they received goods delivered at their own receiving offices. Where a railway company has so acted as to render it necessary and proper for any person to come to the court for redress under the Railway and Canal Traffic Act, the court will, as a general rule, make the rule absolute with costs. Baxendale *v.* London & South Western R. Co., 1 Nev. & Mac. 231.

Cartage.—Undue Preference of themselves by Company.—Public Benefit.—A railway company, with a view to compete with other carriers in the collection and carriage of goods, established receiving-offices in various parts of London, from which goods were brought in vans to the railway station. The gates of the station were closed against the vans of the complainants and other carriers at 6.30 P.M., but the company's own vans were admitted at a much later hour, and the goods brought by them were forwarded by the same night's trains. *Held* that this was giving an undue and unreasonable preference to the company's own traffic to the prejudice of the complainant, and the rule for an injunction was made absolute with costs. *Quære*, whether a course of business necessary for securing an advantage to the public, which at the same time gave a monopoly to the company, would be an undue or unreasonable prejudice to other carriers. Palmer *v.* London, Brighton & South Coast R. Co., 1 Nev. & Mac. 271.

ADMISSION OF PUBLIC VEHICLES INTO STATION.—*Passenger Traffic—Cabs—Demand on Company to redress Grievance—Public Inconvenience.*—The court will not interfere to redress a grievance under this act unless such redress has first been unsuccessfully demanded of the railway com-

ADMISSION OF PUBLIC VEHICLES INTO STATIONS—*Continued.*

pany; nor *semble*, will it compel a railway company to alter its arrangement for the attendance of carriages for the conveyance of passengers arriving at its stations at the instance of job masters whose vehicles are excluded from the station yard, unless it is shown that the course complained of occasioned inconvenience to the public. Ilfracombe Public Conveyance Co. *v.* London & South Western R. Co., 1 Nev. & Mac. 61.

Passenger Traffic—Cabs—Public Inconvenience.—A railway company agreed with a cab proprietor, in consideration of his paying them £600 per annum, to allow him the exclusive liberty of plying for hire within their station. The court refused to grant a writ of injunction against the company, under the Railway and Canal Traffic Act, 1854, at the instance of another cab proprietor, no inconvenience to the public being shown to have arisen from the arrangement. Beadell *v.* Eastern Counties R. Co., 1 Nev. & Mac. 56.

A railway company granted exclusive permission to a limited number of fly proprietors to ply for hire within their station. The court refused to grant a writ of injunction against the company, under the Railway and Canal Traffic Act, 1854, at the instance of a fly proprietor who was excluded from participation in this advantage, although it was sworn by the complainant and by several other fly proprietors, who were likewise excluded, that occasional delay and inconvenience resulted to the public from the course pursued. Painter *v.* London, Brighton & South Coast R. Co., 1 Nev. & Mac. 58.

Passenger Traffic—Omnibus—Practice—Costs.—A railway company having made an arrangement with W. for the conveyance of passengers to and from their station to the town of K., admitted his omnibus within the gates of their station, but refused admittance to the omnibus of M., which conveyed passengers to and from the station through the town of K. to more distant places, to which it was the only public conveyance. No special circumstances being shown by the company to justify the exclusion of M.'s omnibus, the court made absolute a rule under the Railway and Canal Traffic Act, 1854, enjoining the company to admit M.'s omnibus in the same manner and to the same extent as they admitted other vehicles of a similar description. A rule calling on a railway company to show cause why they should not act in compliance with the Railway and Canal Traffic Act is too vague. A rule having been moved without mention of costs, the court made it absolute without costs. Marriot *v.* London & South Western R. Co., 1 Nev. & Mac. 47.

AGREEMENT *by Railway Companies to pay Rent for Easement—Enjoyment Deferred—"Breaking Ground."*—The Bristol & Exeter R. Co. agreed with the Somerset & Dorset Co. to pay to them a certain rent for the power of running through their station-yard and for the use of their station, such rent to commence when the Bristol & Exeter Co., in the construction of their railway, began to "break ground" within six feet of the sidings in the station yard. The

AGREEMENT—*Continued.*

exercise of the power was prevented for some time by objections of an inspector to the Board of Trade that plans deposited by the Somerset & Dorset Co. in Parliament were defective, but these objections were known to the Bristol & Exeter Co. at the time of making the agreement. *Held*, first, that they were liable to pay rent from the time mentioned in the agreement, although they had not enjoyed the easement or the use of the station so soon as they otherwise would have done if the plans had been correct; and secondly, that the "ground was broken" within the meaning of the agreement when the Bristol & Exeter Co. commenced the construction of the line, not when, as preparatory to such construction, they merely removed some rails to take the angles of certain lines which they would have to cross at a level. Bristol & Exeter R. Co. *v.* Somerset & Dorset R. Co., 2 Nev. & Mac. 82.

Construction of Agreement as to Building New Lines.—An agreement between two railway companies contained the following provision: "Each company shall be at liberty to apply to parliament for power to construct lines in its own district for the accommodation of the local traffic in such district; but neither company shall directly or indirectly promote or support any new line in the district of the other." *Held*, that the restriction did not apply to districts occupied by both railways, and that this provision for the application to parliament for liberty to construct lines "for the accommodation of the local traffic" prohibited opposition to such application, but did not interfere with the right of each company to apply to parliament to construct within its own district lines for other than local traffic, subject to the right of the other company to oppose such application. The district of a railway company includes the district adjacent to their line from which traffic is drawn to that line, and if two companies draw traffic from the same district, such district belongs to them both. Caledonian R. Co. *v.* North British R. Co. (No. 2), 2 Nev. & Mac. 285.

Construction of Payment of Preference Shareholder out of Subsequent Balances.—The G. R. Co. were incorporated by an act of parliament which authorized them to make a certain railway, and also confirmed an agreement previously made between them and the C. R. Co., whereby it was provided that the C. Co. should in perpetuity have right to one fourth part of the net revenue (being the gross revenue less certain deductions specified in the agreement) of the G. Co., whatever might be their expenditure in making the proposed railway, and that the G. Co. should provide for all excess of cost beyond the amount of capital specified in the agreement, and that the interest on all money borrowed should form a charge on the remaining three fourths of the net revenue of the said last-mentioned company, but that, subject to such condition, the said G. Co. might borrow certain sums of money on mortgage of the whole of the proposed undertaking. The G. Co. having exercised their borrowing powers, and the one fourth share of the C. Co. having remained unpaid for several years, owing to the whole of the net revenue having been exhausted in payment of interest to the mortgagees, *held*, that the G. Co. were liable to the C. Co. for the amount of the

AGREEMENT—*Continued.*

arrears of such one fourth share, with interest at 4 l. per cent, to be payable out of future balances in priority to dividends. Caledonian R. Co. *v.* Greenock & Wemyss Bay R. Co., 2 Nev. & Mac. 122.

Construction—Onus probandi.—By the fifth article of an agreement between the Midland and Great Western R. Companies, it was provided that they were "to agree as to the . . . leasing . . . any new lines which may be necessary to give proper accommodation to the district in which the companies . . . are directly interested." The Midland Co. proposed to lease a line which traversed a district untouched by their railway, but formed a junction with the Great Western R. at a place lying on the boundary of a district in which both the contracting companies were directly interested. *Held*, that such leasing was not within the terms of the article. *Held*, also, that the words new lines in this clause of the agreement signified lines proposed but not yet authorized by parliament to be constructed. The 18th article was as follows: "The Midland to be allowed to make their line from M. to B., but not beyond, and any application to parliament for a bill for that purpose not to be opposed by the Great Western." The 19th: "The Midland to complete their proposed junction with the B. & E. railway at B. without opposition, it being understood that Bristol and Bath are the termini of the companies (north and south respectively) in that district." *Held*, that, taking into consideration the situation of the parties at the date of the agreement, the words in these clauses referred to a bill at that time contemplated by the Midland Co., and that it was not part of the intent of the agreement to draw a line of separation between the companies, and to bind each to keep to its own side of that line for all time to come. The counsel for the defendant held to have the right to begin, the *onus probandi* substantially lying upon them. Midland R. Co. *v.* Great Western R. Co. (No. 2), 2 Nev. & Mac. 298.

Construction.—Meaning of the words "all traffic to and from the stations of each company" in an agreement. "Through traffic under an agreement, what is." The Central Wales, etc., R. Co. *v.* London, etc., R. Co., 4 R. and Canal Traffic Cas. 101.

Agreement entered into by the provisional committee of a contemplated railway company to lease the line.—Held, not binding upon the company, afterwards incorporated by act of parliament. Monklands R. Cos. *v.* Glasgow, Airdrie and Monklands Junction R. Co., 11 Scotch, Sess. Cas., 2nd Ser. 1395.

For unequal rates cannot be enforced.—An agreement between a shipper of goods by railroad and the general freight agent of a railroad company, that the former should pay the regular rates of freight charged to and paid by the public generally for similar services and like distances, and that the company should pay back to the shipper, by way of rebate, a portion of the freight so charged and paid, thereby giving to him a less rate for transportation than is given to the public generally, is void, as in violation of the statute approved May 2, 1873 (Rev. Stat. 1874, p. 816), against unjust discrimination between shippers, and such rebates of freight cannot be recovered by the shipper from the company. Unjust discrimination by

AGREEMENT—*Continued.*

common carriers is not sanctioned by the common law. When a contract is forbidden by the common or statute law, no court either of law or equity will lend its assistance to give it effect. Indianapolis, D. & S. R. Co. *v.* Ervin (Illinois, Oct., 1886), 27 Am. & Eng. R. R. Cas. 8.

Pro rating through Freights—Agreement and Refusal to pro-rate—Legality of.—The defendants, owning a short railway from New Orleans to Lake Pontchartrain, and one Morgan, owning a line of steamers plying from the lake terminus to Mobile, and the plaintiffs and other parties owning two other steamers in the same trade, an arrangement was made by defendants with Morgan, and, temporarily with the proprietors of the other steamers, respectively, to share *pro rata* the through freight from New Orleans to Mobile. It appeared that this arrangement was unprofitable to the defendants, for the lines of steamers, by competing and lowering the rates of freight, greatly reduced the share coming to the railway. The defendants therefore entered into an agreement with Morgan by which the latter loaned them $250,000, and the former agreed to pro-rate with him the through freight from New Orleans to Mobile, and to charge all other steamers the tariff rates paid by the public generally. The plaintiffs immediately laid up their steamer and sued for damages, on the ground that this pro-rating with Morgan and refusing to further pro-rate with plaintiffs was an illegal combination with Morgan to confer on him an unlawful monopoly and preference. *Held*, that the act of defendants was not in contravention of any statute of Louisiana, or any principle of her jurisprudence; that they might agree or refuse to pro-rate through freight with anybody, and the plaintiffs could not complain of a refusal to pro-rate with them; and that, as common carriers, in the absence of statutory prohibition, their acts in the premises were not unlawful. Towboat Company *v.* Railroad Company, 24 La. An. 1.

Agreement—The Llanelly R. Co., being in want of money to complete an extension line, applied to the Northwestern R. Co. for a loan of £40,000, and it was agreed that the Northwestern Company should lend the money, and having running powers over the lines of the Llanelly Company, an agreement under seal as to running powers was entered into and acted upon for some time, but afterwards the Llanelly Company gave three months' notice to determine it, and after the expiration of that period, the latter company having refused to admit the right of the former to terminate the agreement, the Llanelly Company filed their bill, praying for a declaration that the agreement was determined, and that an injunction might be issued against the Northwestern Company to restrain them from running their trains over the Llanelly Company's line. The agreement contained no stipulations as to its duration or as to the terms on which it might be put an end to. *Held*, that an agreement of that character which contained no stipulations as to its duration, or as to the terms on which it might be put an end to, was one having a permanent and continuing operation, determinable only by mutual agreement. Llanelly R. Co. & Dock Co. *v.* London and Northwestern R. Co., L. R., 8 Ct. App. 942.

AGREEMENT—*Continued.*

To carry between Competitive Stations at equal Fares.—The Midland and Great Western R. Cos. entered into an agreement to carry passenger traffic between competitive stations at "equal" fares, the amount of such fares to be determined, in case of difference, by arbitration. On a reference to the Railway Commissioners, under the Regulation of Railways Act, 1873, S. 8, to fix the equal first-class rate between the competitive stations: *Held*, that the agreement, so far as it neutralized the benefits of competition should be constructed strictly. *Held*, also that in defining "competitive stations" a difference of distance was not material, and that particular places on the lines of both companies, though the course between them might be much more circuitous in the one case than in the other, were competitive in the sense of the agreement. As, however, between many of these places there was practically no more competition than if only one route existed, the application was, on the hearing of the case, narrowed to places where the two companies could effectively compete with each other. *Held*, further, that the company which had the chief control of the traffic, or to which the traffic mainly or properly belonged, by reason of having the shorter or more direct route, or the route being on their main line, or the like, should have the control in fixing the amount of the governing rates in the absence of any agreement or special circumstances to the contrary; and that when a company, from the circumstances of the case, could not carry at a profit, it should not be the company to fix the common rate required by such an agreement as the above as it could not benefit itself, nor could it be the best judge of what would be beneficial to its neighbor. Midland R. Co. *v.* Great Western R. Co., 2 Nev. & Mac. 88.

Working—Construction—Costs.—In a working agreement between two railway companies, a clause whereby the working company agreed to maintain, manage, man, stock, work, and use the owning company's railway, so as properly to develop and accommodate not only the through traffic, but also the local traffic of the district, to be served by the owning company's railway, considered.

Another clause provided for the equal division between the companies of the gross receipts of traffic on the owning company's railway, deducting one moiety of station to station terminals, and also deducting mileage proportion and terminals due to any other company in respect of such traffic. *Held*, that the receipts subject to such division must comprise one moiety of the two terminals which were included in gross receipts, and not merely one moiety of the terminal at the owning company's end of the journey, and that "any other company" referred to any third company interested in particular traffic, and not to the working company. The applicants having established some, though not every, part of their application, were granted one half of their costs. Harborne R. Co. *v.* London & Northwestern R. Co. (No. 2), 2 Nev. & Mac. 326.

ALLOWANCE FOR CARTAGE.—Thompson *v.* Lond. & N. W. R. Co., 2 Nev. & Mac. 115.

ALTERNATE ROUTES.—See Caledonian R. Co. *v.* North British R. Co., 3 Nev. and Mac. 403; Central Wales, etc., R. Co. *v.* London, etc., R. Co., 4 R. & Canal Traffic Cas. 101; Same *v.* Same, Ib. 211; Swindon, etc., R. Co. *v.* Great Western, etc., R. Co., Ib. 349.

AMENDING RULE.—*Proceedings Generally.*—The railway commissioners have full powers of allowing the proceedings before them to be amended, and will exercise such powers liberally, so as to give effect to the provision of the Regulation of Railways Act, 1873. Corporation of Dover *v.* Southeastern & London, Chatham & Dover R. Cos., 1 Nev. and Mac. 349. See Baxendale *v.* Great Western R. Co., Ib. 191; Baxendale *v.* North Devon R. Co., Ib. 180; Cooper *v.* London & Southwestern R. Co., Ib. 185.

AMENDMENT.—At hearing by adding complaint under section 14 of the Regulation of Railways Act, 1873, allowed. Young *v.* Gwendraeth Valleys R. Co., 4 R. & Canal Traffic Cas. 247.

APPEAL.—*Book of Rates.*—Case for the opinion of a superior court by way of appeal from an order enjoining a railway company to keep rate books, pursuant to section 14 of the Regulation of Railways Act, 1873, refused on the ground that the question as to what constitutes a "station" under that section is a question of fact depending upon the circumstances of the case. Jones *v.* Northeastern R. Co., 2 Nev. & Mac. 213.

Collection of Traffic—Special Services and Charges.—Case for the opinion of a superior court, refused on the question whether a railway company were bound to run over a foreign line and collect traffic therefrom without receiving any remuneration for so doing other than the mileage rate chargeable on their own railway, on the ground that it was a question of reasonableness, which was a question of fact; and on the question whether the company were entitled to charge the tolls mentioned in their act for certain traffic, on the ground that it involved the question whether the company were carriers or merely toll-takers, which was a question of fact; but granted on the question whether or not the company were bound to supply wagons for the traders' traffic under the provisions of their special acts. Watkinson *v.* Wrexham, Mold, etc., R. Co., 3 Nev. & Mac. 5, 164.

Construction of Lease—Arbitration.—Case for the opinion of a superior court, refused on the question whether or not, according to the true construction of a railway lease and the statutes referred to in it, the lessors were bound to execute or pay for certain additional works, on the ground that the parties had agreed in the lease to refer such question to arbitration, and that it would be inexpedient to set aside that mode of settlement, especially after the commissioners had given their decision as arbitrators. Southwestern R. Co. *v.* Staines, etc., R. Co., 3 Nev. & Mac. 54.

Case for the opinion of a superior court, refused, as to the meaning of the words "actual cost" in a certain award made under an Act of Parliament, on the ground that it was not a question of law; but granted as to whether the award required the actual cost to be so restricted, as regards what it comprised as that the account of each half year should show a

APPEAL—*Continued.*

balance available to be paid to the S. Company. Sevenoaks, etc., R. Co. *v.* Chatham & Dover R. Co., 3 Nev. & Mac. 75, 287.

Case for the opinion of a superior court, granted on the question whether the commissioners had power, under sections 11 and 12 of the Regulation of Railways Act, 1873, to allow and apportion through rates and tolls, which would give to the forwarding company less tolls than the gross tolls given to them under their acts, and which would deprive them of certain privileges granted to them by their said acts; and on the question whether the 11th section applied to railway and canal companies who were not carriers; and also upon the question whether, upon the true construction of sub-section 8 of section 11, it was or was not sufficient for the purpose of limiting the commissioners' discretion in the apportionment of a through rate, that one of the companies affected by the through rate, having a portion only of another line of communication between the same termini as those of the through route, should be legally charging upon local traffic of a like description, carried by a like mode of transit over such portion of the said other line, rates per mile higher than the mileage rates apportioned to them out of the through rates. Warwick & Birmingham Canal Co. *v.* Birmingham Canal Co., etc., 3 Nev. & Mac. 127, 324.

Continuous Line of Railway Communication.—Case for the opinion of a superior court, granted on the question whether, upon the true construction of the Railway and Canal Traffic Act, 1854, the cases in which a railway company was bound to provide facilities for receiving and forwarding by its railway traffic coming by another, which formed with it a continuous line of communication, were or were not confined to cases in which, in the existing state of the two railways, it was reasonably possible for the former company to take over such traffic at the point of junction. Victoria Colliery Co. *v.* Neath & Brecon and Midland R. Cos., 3 Nev. & Mac. 40.

Illegal Charges.—Case for the opinion of a superior court granted on the question whether upon the true construction of the Railway and Canal Traffic Act, 1854, section 2, a railway company did or did not afford, according to its powers, all reasonable facilities; if it made illegal or excessive charges for the conveyance of traffic; and whether, where a railway company carried and conveyed traffic upon its railway, it could, by a notice, relieve itself from the obligation of carrying at rates not exceeding those which had been fixed by parliament. Aberdeen Commercial Co. *v.* Great North of Scotland R. Co., 3 Nev. & Mac. 225.

Practice In.—Upon the argument of a case stated by the railway commissioners under section 26 of the Regulation of Railways Act, 1873, the counsel for the party seeking to alter the *status in quo* has the right to begin. Watkinson and others *v.* Wrexham, Mold & Connah's Quay R. Co., 3 Nev. & Mac. 164.

Terminal Service.—Case for the opinion of a superior court refused on the question whether the railway company, in using or giving the use of sidings for shunting, or handling of goods and other like services, "per-

APPEAL—*Continued.*

formed a terminal service" within the meaning of their special acts, on the ground that the commissioners were not authorized to state a case on such a point, because their decision as to terminal charges was expressly made binding in courts in all legal proceedings whatsoever. Chatterly Iron Co. *v.* North Staffordshire R. Co., 3 Nev. & Mac. 238.

Through Rates.—Case for the opinion of a superior court refused on the ground that the decision was based on questions of fact and not of law. Central Wales & Carmarthen Junction R. Co. *v.* Great Western R. Co., 2 Nev. & Mac. 191.

Through Rates—Sea Traffic.—Case for the opinion of the Court of Session in Scotland as to the title of the applicants to apply for through rates under the 11th section of the Regulation of the Railways Act, 1873. And as to whether steamboat traffic was within that section, granted; but refused on the question as to whether there was any evidence to show that the granting of through rates was a due and reasonable facility. Greenock & Wemyss Bay R. Co. *v.* Caledonian R. Co., 2 Nev. & Mac. 238.

Undue Preference.—Case for the opinion of a superior court refused upon the question whether the commissioners ought not to have dismissed on application under section 2 of the Traffic Act, 1854, on the ground that the applicants had omitted to show that the prejudice complained of had caused them any specific damage, and that the prejudice was undue and unreasonable. Denaby Main Colliery Co. *v.* Manchester, Sheffield & Linconshire R. Co., 3 Nev. & Mac. 434.

And if the commissioners erroneously came to the conclusion that there was evidence before them of a breach of section 2 of the Traffic Act, 1854, this is an error in law in respect of a matter within their jurisdiction, and therefore not matter for prohibition but for appeal. Ib.

Case granted as to the construction to be placed upon a section of a special act of a railway company. Tharsis Sulphur & Copper Co. *v.* London & Northwestern R. Co., 3 Nev. & Mac. 463.

APPROVAL OF WORKING AGREEMENT—*Objections—Diversion of Traffic—Competitive Routes*—The S. R. Co., and the N. W. Co. R. applied for the approval of an agreement providing for the working of the line of the former company by the latter in perpetuity; certain other railway companies and the corporation and traders at N., a seaport town in communication with the S. line, raised objections to the approval of the agreement, the principal of which were that it would change the course of traffic which went to N. and send it in the opposite direction, and that part of the S. line was in the most direct line of communication by which certain traffic could be carried by the G. W. Railway (which competed with the N. W. R.) and the working of the S. line by the N. W. Co. would act unfavorably on such traffic. *Held*, as to the first objection, that the N. W. Co. must make arrangements to prevent the introduction of charges or conditions of carriage on the S. line, which might cause traffic which would otherwise go to N. to go in the opposite direction; and as to the second objection, that the N. W. Co. should grant running powers to the

APPROVAL OF WORKING AGREEMENT—*Continued.*

G. W. Co. over the part of the S. line lying in the most direct line of communication between the G. W. line and N. Subject to these conditions, the agreement was approved. Sirhowey R. Co. with London & Northwestern R. Co., 2 Nev. & Mac. 264.

Objections.—The court is unwilling, except on some real substantial objection to a working agreement, to refuse approval of it, where the railway company may, perhaps, in consequence lose the opportunity of being able to complete their railway within the time limited by their act; the fact that the company who under the agreement are to work the line, are unable to pay a dividend on their capital, and unable, with their existing resources, to keep their own line in proper repair, is not a sufficient ground for such refusal where they have advantages (such as a line adjoining the line agreed to be worked) over any other company who would compete for the working of the line. *Semble*, an article in a working agreement entitling the working company to transfer the right to work the line to another company at some future time will not be approved. *In re* the working agreement between the West Cork and Glen Valley R. Cos., 2 Nev. & Mac. 334.

Revision—Special Act.—The G. Ry. Act, 1862, § 59, after reciting that an agreement made in 1862 and scheduled to the act had been entered into between the provisional directors of the G. R. Co. and the C. Ry. Co. in relation to the construction and maintenance of the railway and works by the act authorized and the working and management of the traffic thereon, enacts that "the said agreement is hereby sanctioned and confirmed, and shall be as valid and obligatory upon the companies as if they had been authorized by this fact to enter into the said agreement, and as if the same had been duly executed by them after the passing of this act;" and section 61 enacts that "it shall be lawful for the Board of Trade, if they think fit, on the expiration of ten years from the date of the agreement, and on the expiration of every period of ten years from the time when any revision thereof shall be made by them in manner herein provided, to cause the said agreement to be revised." The Regulation of Railways Act, 1873, section 10, enacts that the following powers and duties of the Board of Trade shall be transferred to the railway commissioners, namely: (1) The powers of the Board of Trade under Part III. of the Railway Clauses Act, 1863, or under any special act with respect to the approval of working agreements between railway companies. . . . And the provisions of the said acts conferring such powers or imposing such duties, or otherwise referring to such powers or duties, shall, so far as is consistent with the tenor thereof, be read as if the commissioners were therein named instead of the Board of Trade. The G. R. Co. applied to have the said agreement made by them and the C. Co., and confirmed under the 59th section of their special act as aforesaid, revised by the railway commissioners. *Held*, by the commissioners, that they had no jurisdiction to revise an agreement which had been approved by parliament and which the Board

APPROVAL OF WORKING AGREEMENT—*Continued.*

of Trade never had power to approve. Greenock & Wemyss Bay R. Co. *v.* Caledonian R. Co., 2 Nev. & Mac. 132.

APPROVAL OF WORKING AGREEMENT.—See *Re* Taff, Vale, etc., R. Co.'s Working Agreement, 4 R. and Canal Traffic Cas. 54.

ARBITRATION.—*Agreement to Refer—Confirmed and made more binding by and scheduled to Act—Completion of Works to Satisfaction of Engineers—Condition precedent to Arbitration—Jurisdiction of Railway Commissioners—Prohibition—Regulation of Railways Act*, 1873, s. 8.—The solicitors of the A. and B. R. Cos., and the solicitor to the promoters of the C. R. Co., about to be incorporated, entered into an agreement which provided that it should be put into the schedule of a bill then pending in parliament for the incorporation of the C. Co., and that the agreement should be confirmed by the provisions of the act when it was passed. The act of parliament enacted (sec. 37) that "the heads of agreement which are set forth in the schedule of this act are hereby confirmed and made binding on the said companies respectively." By clause 1 of such agreement the C. Co. agreed, at their own expense, to make and complete the railways, stations, and works to the satisfaction of the engineers of the three companies; and by clause 2, "from and after the time when the railways are so completed and authorized to be open for public traffic," the A. and B. companies agreed, at all times, at their own joint expense and risk, to maintain, manage, man, stock, work, and use the C. line and works; and by clause 18, "all differences between the three companies, or any two of them, and all questions as to the carrying into effect the provisions of this arrangement, shall be determined by arbitration under 'The Railway Companies Arbitration Act, 1859,' by a single arbitrator to be, if not agreed on, appointed by the Board of Trade, with ample powers." The C. Co. applied to the commissioners under section 8, of the Regulation of Railways Act, 1873, for an order enjoining the A. and B. R. Cos., at all times, at their own joint expense and risk, to manage, maintain, man, stock, work, and use the C. line and works in accordance with the terms of clause 2 of the agreement. *Held*, by the commissioners, that the conditions of clause 1 of the agreement with reference to the satisfaction of the engineers had been complied with. *Held*, also, by the commissioners, that they had jurisdiction under section 8 of the Regulation of Railways Act, 1873, and the arbitration clause in the agreement, to hear and determine the matter in dispute, and that the railway companies were bound to work the line jointly. *Held*, by the Queen's Bench Division (Grove, J., and Smith, J.), that it not being alleged in the application that the works were completed to the satisfaction of the engineers, the commissioners had no jurisdiction to entertain the application. *Held*, by Smith, J. (Grove, J., *dubitante*), that the C. Companies Act (sec. 37) did not make the provisions of the agreement contained in the schedule to that act "provisions of any general or special act," and that, consequently, the commissioners had no jurisdiction to entertain the application. Halesowen R. Co. *v.* Great Western R. Co., *et al.*, 4 Ry. and Canal Traffic Cas. 224.

ARBITRATION—*Continued.*

Award of Arbitrator.—Security for Costs of Joint Station—The award of an arbitrator, upon a reference by the N. & R. R. Cos., decided that a joint station, portion of railway, and works should be constructed by the R. Co., and that the costs and expenses of constructing the same should be borne and paid by the two companies in equal shares. The companies differed first as to the length of line to be constructed under the award; secondly, as to an alteration (which was also a great improvement) proposed by the R. Co. in the mode of carrying out the award by substituting an incline for a hoist as a means of raising goods from a low to a high level. *Held*, on the first point, that upon the construction of the award the contention of the N. Co. was right; on the second, that the N. Co., not having objected to the alteration when informed of it, must be presumed to have consented to it, but that they must have the same facilities for passing to and from the incline that the R. Co. would have, and authority was given them to defer payment of their share of the cost of the line and station until these were given them to the satisfaction of the court. The R. Co. having incurred considerable outlay in the construction of the joint station and line, applied for an order for payment from the N. Co., or that the latter company might give security. The N. Co. contended that no payment was due from them until the works were completed. *Held*, that under the award payment must be concurrent by both parties, but that the R. Co. were not entitled to be paid until they advanced the side of the works in which the N. Co. were interested as far as their own, but that in the mean time the N. Co. must give security for the costs and expenses incurred by the R. Co. Isle of Wight R. Co. *v.* Ryde and Newport R. Co., 2 Nev. & Mac. 251.

Settlement of Terms of User—Railway and Works—Jurisdiction of Commissioners—The Regulation of Railways Acts, 1873, s. 8.—By the Central Wales and Carmarthen Junction Railway Act, 1873, sec. 16, the Central Wales & Carmarthen Junction R. Co., and all companies or persons lawfully working or using their railway, were authorized to run over, work, and use, with their engines and carriages, and for the purposes of their traffic, so much of the Llanelly R. as lies between the Vale of Towny R. and the junction with the Carmarthen R., together with all stations, booking-offices, sidings, works, and conveniences connected with the said portion of railway; and by sec. 17, the terms, conditions, and regulations to which the Carmarthen Junction Co. and such other companies and persons should be subject in respect of said use, and the tolls or other consideration to be paid by them for the same, should, if not agreed upon between them and the companies using or working the said railway of the Llanelly Co., be, from time to time, determined by arbitration, in the manner provided by the Railway Companies Arbitration Act, 1859. Upon an application to the railway commissioners under section 8 of the Regulation of Railways Act, 1873, to settle the terms of user under section 17 of the Central Wales Act, 1873, objection was made to the hearing the application, on the ground that the user in question was a user

ARBITRATION—*Continued.*

under other powers than those given by the Central Wales Act, 1873. *Held* by the commissioners (Mr. Commissioner Price dissenting), that part of the user was under that act, and that they had jurisdiction to entertain the application. Great Western R. Co. *et al. v.* Central Wales, etc., R. Co. *et al.*, 4 Ry. and Canal Traffic Cas. 358. See also Clonmel Traders *et al. v.* Waterford, etc., R. Co., Ib. 92; Midland, etc., R. Co. *v.* Dublin & M. R. Co., Ib. 145.

Traffic Agreement—Reference to Railway Commissioners under the Regulation of Railways Act, 1873, s. 8—*Jurisdiction—Injunction—Prohibition.*—The Railway Companies Arbitration Act, 1859, does not authorize railway companies to refer differences between them to arbitration, but merely authorizes railway companies to agree to a reference in a particular form and manner. With regard to differences arising in the course of their business, railway companies have power to agree to a reference without the authority of an act of parliament. The 8th section of the Regulation of Railways Act, 1873, does not apply to an arbitration clause inserted in an agreement between railway companies made in pursuance of a special act, where such special act does not in itself require or authorize the matters comprised in the arbitration clause to be referred. A working agreement was made between two railway companies, the agreement was made under the provisions of a special act, but there was no clause in such act requiring or authorizing matters in difference to be referred to arbitration. A dispute afterwards arose between the companies under the agreement, and one of them applied to the commissioners to decide it. Upon application by the other company for prohibition, on the ground that the commissioners had no jurisdiction to entertain the application, since the dispute was not required or authorized to be referred to arbitration under the provisions of any general or special act. *Held*, by the Court of Appeal (reversing the decision of Jessel, M. R.), that the railway commissioners had no jurisdiction to determine the matter in dispute between the two companies. Waterford & Limerick R. Co. *v.* Great Western R. Co., 3 Nev. & Mac. 546.

A working agreement between two companies, made in pursuance of a special act, contained a general arbitration clause. *Held*, that a difference under this agreement was a difference between railway companies under the provisions of a special act required or authorized to be referred to arbitration within the meaning of the 8th section of the Regulation of Railways Act, 1873. The Railway Companys Arbitration Act, 1859, s. 2, authorizes railway companies to refer to arbitration any matters they might lawfully settle by agreement. *Quære*, whether any difference concerning matters which two railway companies might lawfully settle by agreement is a difference authorized to be referred to arbitration within the meaning of sec. 8 of the Regulation of Railways Act, 1873. Port Patrick R. Co. *v.* Caledonian R. Co., 3 Nev. & Mac. 189.

Traffic Agreement—Reference to the Commissioners under the Regulation of Railways Act, 1873, s. 8.—An agreement that a railway company should

ARBITRATION—*Continued.*

work and use the railway of another company, "so as properly to develop and accommodate not only the through but also the local traffic of the district served by the railway, and in case of difference that the matter should be referred to arbitration under the Railway Companies Arbitration Act, 1859," was, by a subsequent act of parliament, incorporated with and made to form part of the act.

An application was made by the owning company to the railway commissioners under sec. 8 of the Regulation of Railways Act, 1873, alleging that the working company had not, within the meaning of the agreement, so worked and used the railway as to properly develop and accommodate the through traffic mentioned in the agreement. The commissioners entertained the application and determined the same in favor of the working company. Case granted for the opinion of a superior court as to the meaning of the words "at the end of five years" in the agreement. Eastern, etc., R. Co. *v.* Midland R. Co., 4 R. and Canal Traffic Cas. 323.

Arbitration—Where, under an agreement confirmed by act of parliament, the parties were bound to settle by arbitration all differences that might arise between them as to the meaning and effect of the agreement, or as to the method of carrying it out. *Held*, that the jurisdiction of the courts was by this agreement excluded, and that all disputes arising under it must be settled by arbitration. Caledonian R. Co. *v.* Greenock and Wemyss Bay R. Co. (L. R.), 2 Sc. App. 347.

Generally, see Swansea Improvements Tramways Co. *v.* Swansea and Mumbles R. Co., 3 Nev. & Mac. 339.

ATTACHMENT FOR DISOBEDIENCE—*Coal Traffic.*—The court refused to grant an attachment against a railway company for disobedience to a writ of injunction under the Railway and Canal Traffic Act, 1854, enjoining them to desist from giving an undue preference, in respect to the carriage of coals, to persons carrying coals from P. or other places to or towards certain places mentioned in the rule, the affidavits on the part of the company showing a *bona-fide* endeavor on their part to conform to the order of the court, although it appeared that the reformed scale of charges still operated, in some other respects, injuriously to the interests of the complainants, and advantageously to the other parties. Ransome *v.* Eastern Counties R. Co. No. 3, 1 Nev. & Mac. 116.

BOOKING OFFICE.—See South Eastern R. Co. *v.* Railway Commissioners and The Corporation of Hastings, 3 Nev. & Mac. 464; Dublin and Meath R. Co. *v.* Midland Great Western of Ireland R. Co., ib. 379.

BOOK OF RATES.—A company refusing to show their rate books at stations will have to pay the costs of any proceedings which the parties in the absence of information which the rate books would have afforded had "reasonable and probable cause" for taking. Clonmel Traders, *et al.* *v.* Waterford & L. R. Co. 4 Ry. and Canal Traffic Cas. 92.

Carrier—Parcel Rates.—Upon application by a carrier for an order under section 14 of the Regulation of Railways, Act, 1873, requiring a railway company to distinguish in their book of rates how much of a parcel's

BOOK OF RATES—*Continued.*

rate was for conveyance on the line and how much for other expenses: *Held*, that, as it was proved in evidence that nothing was included in the rate except the carriage on the railway, no order would be made. Robertson *v.* Midland Great Western R. Co. (Ireland), 2 Nev. & Mac. 409.

Carrier—Parcel Rates.—Upon the application of a carrier, who collected and carted parcels to the terminus of a railway company for conveyance, for an order requiring the railway company to distinguish in their book of rates how much of their parcels rates was for conveyance on the railway, and how much for collection or cartage, *held*, that, as the railway company's parcel rates included charges for other services besides conveyance, they must distinguish in the book of rates at the terminus where the applicant's parcels were received for conveyance, how much of the parcels rates was for conveyance on the railway and how much for other expenses, and must specify the nature and detail of such other expenses. Robertson *v.* Great Southern & Western R. Co. 2 Nev. & Mac. 374.

Distinguishing Rate—Competitive Rate.—A railway company are bound under sec. 14 of the Regulation of Railways Act, 1873, to distinguish in their book of rates and distances how much of a rate charge is for conveyance and how much for terminal expenses, specifying the nature and detail of such expenses, although the rate charged is a lump-sum rate fixed by the company—in order to compete with other lines. Baily *v.* London, Chatham & Dover R. Co., 2 Nev. & Mac. 99.

Mineral Rates.—A railway company arranged their mineral traffic into three districts, and in each district had a principal or central station at which the mineral rate books were kept. No books of mineral rates were kept at any other stations, although many of such stations were close to the large iron works, quarries, and coal mines, and a very considerable traffic in coal was brought down by rail to the main line and sent forward from such stations, or from sidings near them. The mineral traffic from the local stations was charged and booked at the central stations only. *Held*, that this arrangement was a contravention of section 14 of the Regulation of Railways Act, 1873, which requires a railway company to keep "at each of their stations a book or books showing every rate for the time being charged for the carriage of traffic other than passengers and their luggage from that station to any place to which they book," and that the obligation to keep the book of rates at the station from which the rates are charged attaches equally whether the booking is done there or elsewhere. *Semble*, that the words "to which they book" in section 14 of the Regulation of Railways Act, 1873, mean "to which they quote a rate." To an application for an order requiring a railway company to distinguish in the rate books kept at each of their stations how much of the rate was for the conveyance of the traffic on the railway, and how much for other expenses, the railway company answered that the rates charged were mileage rates within their parliamentary powers, and were not made up of separate sums. *Held*, that an order to distinguish such rates should be made, as it

BOOK OF RATES—*Continued.*

did not follow that the whole of each rate was for conveyance only, and that part was not for other expenses. James *v.* Northeastern R. Co., 2 Nev. & Mac. 208.

Order to Distinguish in Books of Rates and Distances.—An order under section 14 of the Regulation of Railways Act, 1873, will be made only as to rates which are being charged by a railway company at the time of the application. Even if the difference between the maximum charge which a railway company may be entitled to make for conveyance and the amount actually charged is small, the railway company will be ordered to distinguish how that difference is made up. The amount of each charge which the company claim a right to make in connection with each description of service rendered must be shown. Hall & Co. *v.* London, etc., R. Co., 4 Ry. & Canal Traffic Cas. 398.

"*Station*"—*Coal Rates.*—The 14th section of the Regulation of Railways Act, 1873, requires railway companies to keep at their stations books of rates charged for the carriage of traffic (other than passengers and their luggage) from such stations to places where they book. The L. & N. W. R. Co. carried coals in owners' wagons from certain collieries; the wagons were loaded and made into trains by the colliery owners, and placed by them in coal sidings, whence they were taken by the railway companies' engines, and the company contended that they were not bound to keep books of rates in respect of such traffic. *Held*, that for the purpose of coal traffic the said coal sidings were "stations" within the meaning of the above section, and that the companies were bound to keep books of rates for the conveyance of coals therefrom, such books to be kept either at the sidings (if accessible to the public), or for the greater convenience of the company and the public at the station where the general merchandise traffic of the district was conducted. Harbone R. Co. *v.* London & North Western R. Co., 2 Nev. & Mac. 169.

Terminal Services and Charges—Order Specifying Nature and Detail of.—Section 14 of the Regulation of Railways Act, 1873, enacts (*inter alia*): "The commissioners may from time to time on the application of any person interested, make orders with respect to any particular description of traffic requiring a railway company or canal company to distinguish in such book how much of each rate is for the conveyance of the traffic on the railway or canal, including therein tolls for the use of the railway or canal, for the use of carriages or vessels, or for locomotive power, and how much is for other expenses, specifying the nature and detail of such other expenses." *Held*, that the words "specifying the nature and detail of such other expenses" require a railway company to state in their rate book to which the order made applies what terminal services they undertake to perform with regard to the particular traffic, and how much they charge for each of such terminal services, and that a railway company does not sufficiently comply with the section by giving a list of the various terminal services which they perform, and stating what their total charge is for the whole of these services. Colman *v.* Great Eastern R. Co., 4 R. & Canal Traffic Cas. 108.

BOOK OF RATES.—*Continued.*

Terminal Services and Charges—Regulation of Railways Act, 1873, *Section* 14.—It being the duty of a railway company to inform any person interested, and applying to it for information, how much of each local and through rate in its entirety is for conveyance, and how much is for other expenses, specifying the nature and detail of such other expenses; if the information is withheld, the railway commissioners will, on application under section 14 of the Regulation of Railways Act, 1873, order it to be given, and to be made public by proper entries in the rate book, and will order the railway company to pay the costs of the proceedings which became necessary for the purpose of obtaining such information. Cairns *v.* Northeastern R. Co., and Coxon *v.* Northeastern R. Co., 4 R. & Canal Traffic Cas. 221.

The withdrawal of rates by a railway company, after an application has been made to the railway commissioners, will not disentitle an applicant to an order under section 14 of the Regulation of Railways Act, 1873, calling on the company to distinguish how the rate is made up. Berry *v.* London, etc., R. Co., 4 R. & Canal Traffic Cas. 310.

Through Rates.—The book of rates which a railway company are required by the 14th section of the Regulation of Railways, 1873, to keep at their stations, should show all rates, local as well as through, which are being charged from the station where the book is kept. Through rates need not be shown, in whole or in part, at any other station than the one from which the traffic carried at through rates is forwarded in the first instance. Oxlade *v.* Northeastern R. Co., 3 Nev. & Mac. 35.

It is the duty of a railway company to inform any person interested, and applying to it for information, how much of each local or through rate in its entirety is for conveyance, and how much is for other expenses, specifying the nature and detail of such other expenses, and if the information is withheld, it will be ordered by the railway commissioners to be given and to be made public by proper entries in the rate-book. A railway company is not required, under section 14 of the Regulation of Railways Act, 1873, to show how the through rates quoted by it are divided between the railway companies receiving them. Watkinson and others *v.* Wrexham, Mold & Connah's Quay R. Co., 3 Nev. & Mac. 446.

The applicants, traders, having premises connected by private sidings with the goods station of a railway company, loaded their own goods and placed the wagons, duly loaded and labelled, in sidings belonging to the railway company, and the only work of a terminal station which the railway company had to perform before such wagons left their goods stations was that of arranging them in proper train order. In the case of goods consigned to such traders, the unloading took place on their own premises, the railway company doing part of the haulage from their goods station to the complainant's premises. The railway company charged uniform mileage rates for all traffic, including that of the complainants. *Held*, that the rates could not be disintegrated into mileage and terminal charges, and that the applicants were not entitled to a reduction. Howard *v.* Midland R. Co., 3 Nev. & Mac. 253.

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See also Chatterly *v.* North Staffordshire R. Co., 3 Nev. & Mac. 245; Robertson *v.* Great Southern & Western R. Co. (Ireland), 2 Nev. & Mac. 374; Robertson *v.* Midland Gt. Westn. R. Co. (Ireland), 2 Nev. & Mac. 409.

BRANCH RAILWAY.—See Dublin Whiskey Distillery Co. *v.* Midland Great Western R. Co. of Ireland, 4 Railway and Canal Traffic Cas. 32.

BREATING GROUND (meaning of).—See Bristol & Exeter R. Co. *v.* Somerset & Dorset R. Co., 2 Nev. & Mac. 82.

BREWERS' TRAFFIC.—See Richardson *v.* Midland R. Co., 4 Ry. and Canal Traffic Co. 2; Girardot *et al. v.* Midland R. Co., Ib. 291.

BRIDGE—*Connecting Platforms.*—See Southeastern R. Co. *v.* Railway Commissioners and Corporation of Hastings, 3 Nev. & Mac. 464.

BY-LAWS.—A canal company were empowered by act of parliament to make by-laws for the good government of the company, and for the good and orderly using of the navigation. *Held*, that this power did not authorize the company to make a by-law that the navigation should be closed on every Sunday throughout the year, and that no business should be transacted thereon during such time; and that such by-law was illegal and void. The Calder & Hebble Navigation Co. *v.* Pilling and others, 14 M. & W. 76.

Where a by-law of a railway company imposes certain duties on passengers, and lays correlative duties on the company, the company must strictly have complied with the by-law on their part to entitle them to enforce it against the passenger. Jennings *v.* Great Northern R. Co., 35 L. J., Q. B. 15; L. R., 1 Q. B. 7.

CABS.—See Beadell *v.* Eastern Counties R. Co., 1 Nev. & Mac. 56; Painter *v.* London, Brighton & South Coast R. Co., Ib. 58.

CANAL—*Maintenance of Canal—Management by Railway Company.*—A railway company managed a canal, collected the tolls, repaired the weirs and lock-gates, and paid the rents due by the proprietors of the navigation. *Held*, that they were a railway company, "having the management of" a canal within the meaning of the Regulation of Railways Act, 1873, s. 17; but that having discontinued the management and collection of tolls, before the date of an application seeking to enforce the provisions of that section against them, they had relieved themselves from liability to maintain the canal thereunder. As the company had given no public notice of the relinquishment of their management, they were ordered to pay half the costs of the applicants. Foster *v.* Great Western R. Co., 3 Nev. & Mac. 14.

Right to Navigate by Steam.—The right of traverse by the public on a canal cannot be confined within the state of science as it existed when the undertaking was projected. The public may adapt the inventions and discoveries of practical science to secure a more complete and efficient enjoyment of rights conferred, but such inventions or discoveries must not interfere with or endanger the existence of the property in or over which such rights exist. A carrier claimed a right to navigate a canal with boats propelled by steam, both for conveying loads as well as for drawing barges. Upon a bill to establish the right, *held*, after experiments made by an en-

CANAL—*Continued.*

gineer at the instance of the court, that the plaintiff had a right to adapt modern improvements to the enjoyment of his rights, provided such improvements did not injure the canal or tend to destroy its existence. Case *v.* The Midland Counties R. Co., 28 L. J., ch. 726.

Traffic—Reduction of Tolls.—Upon a reference to the railway commissioners by the Board of Trade under 37 and 38 Vic. c. 40. S. 6, they reduced the tolls charged by the Great Western R. Co., upon the Kennet and Avon Canal upon the complaint of traders using the canal under the provisions of the Great Western Act, 1852. Wilts, etc., Traders' Association *v.* Great Western R. Co., 3 Nev. & Mac. 20.

CANAL TOLLS.—See Denaby Main Colliery Co. *v.* Manchester, etc., R. Co., 4 R. & Canal Traffic Cas. 28.

CARRIER.—See generally Dublin & Meath R. Co. *v.* Midland Great Western of Ireland R. Co., 3 Nev. & Mac. 379; Thomas *v.* North Staffordshire R. Co. Ib. 1; Aberdeen Lime Co. *v.* Great North of Scotland R. Co. Ib. 205; Chatterly Iron Co. *v.* North Staffordshire R. Co., Ib. 205; Fishbourne *v.* Great Southern & Western R. Co. (Ireland) 2 Nev. & Mac. 224.

Advising Consignee of Arrival of Train.—See Western Colliery Co. *v.* London & N. W. R. Co., 4 Ry. & Canal Traffic Cas. 258.

Admission of Vehicle into Station Yard.—An omnibus proprietor who carries passengers and their luggage for hire to and from a railway station, cannot maintain an action against the company for refusing to allow him to drive his vehicle into the station yard. Barker *v.* Midland R. Co., 18 C. B. 46.

Admission of into Railway Station.—A railway company is not liable in an action by a common carrier of goods and passengers, for refusing to admit him within the precincts of one of their stations. Parker *v.* Midland R. Co., 27 L. T. 107.

Contract for carriage of Military Stores—Payment of full Rate—Recovery of Excess.—A carrier, having a contract for his own benefit with the military authorities for the carriage of military stores and baggage, produced to the railway company the military route or order for the conveyance of military stores and baggage, accompanied by a military escort, and required the company to carry them at the low rates prescribed by the 5 and 6 Vict. c. 55, s. 20, and 7 and 8 Vict. c. 85, s. 12; but the company insisted upon charging the ordinary rate, which was paid by the carrier: *Held*, that he could not recover back the excess as money had and received to his use. Robertson *v.* Great Southern & Western R. Co., 11 Ir. R. C., L. 63.

Carriage of packed Parcels—Discrimination.—The defendants, a railway company, advertised themselves to carry parcels, etc., from London to Glasgow (though their own line ended at Preston), and habitually received, booked, and carried parcels of all descriptions from London to Glasgow (receiving prepayment for the whole distance), having made arrangements with other companies, by which the defendants' vans, being locked in London, were carried through from Preston to Glasgow, under the

CARRIERS—*Continued.*

management and by the locomotive power of other companies. The defendants had issued written orders to their servants that "packed" parcels should be invoiced to termini of the defendant's line only. The plaintiff had received notice of this order, but it had never been enforced against any one but the plaintiff, and the defendants had knowingly carried packed parcels from London to Glasgow since the order was issued; but they refused to carry a packed parcel for the plaintiff further than Preston. *Held*, first, that by the 8 & 9 Vict. c. 20, ss. 86, 87, and 89 the defendants were in the position of common carriers, and that having held themselves out and acted as common carriers from London to Glasgow, they were bound by the common law to receive and carry all goods tendered to them to be carried from London to Glasgow, although the latter place was out of England. Secondly, that, being common carriers, and having carried packed parcels for some other persons, they were bound to carry them for all. Crouch *v.* London & Northwestern R. Co., 7 Ry. Cas. 717.

Carrier—Extent of Obligation.—The 86th section of the Railway Clauses Consolidation Act (8 and 9 Vict. c. 20), is an enabling provision; and if a company act as carriers they are not bound to carry all kinds of goods from and to every station on the line, but only such goods, and to and from such places, as they have publicly professed to do and have convenience for that purpose. Johnson *v.* Midland R. Co., 4 Exch. 367, and 6 Ry. Cas. 61.

Charges—Recovery of Excessive.—The plaintiff, a carrier, sent goods by the defendants to be carried on their line, as also that of the Great Western, a continuous line; he objected to the charges as excessive, but paid the amount claimed under protest, making no tender of any sum as a reasonable charge. *Held*, that he was entitled to recover back the amount paid above what was a fair and reasonable charge in an action for money had and received, and that the whole sum so overpaid was recoverable against the defendants, though a portion of it was received by them as agents for the Great Western Railway Co. Parker *v.* Bristol & Exeter R. Co., 6 Ry. Cas. 776.

Discrimination against Carrier.—The special act of the Great Northern Railway Co. which empowers the company to charge for the carriage of small parcels any sum which they may think fit (8 Vict. c. 20), is incorporated with the special act; and sec. 90, while it empowers a company to vary the tolls upon their railway as they may think fit, provides "that all such tolls be at all times charged equally to all persons, and after the same rate, in respect of all . . . goods of the same description, and conveyed by a like carriage passing over the same portion of railway under the same circumstances, and no reduction or advance in any such tolls shall be made either directly or indirectly, in favor of or against any particular company or person using the railway." *Held*, that the company were compelled to charge all persons alike, and that they were not justified in charging a carrier more than the rest of the public. Crouch *v.* Great Northern R. Co., 9 Exch. 557.

CARRIERS—*Continued.*

Regulation of Railways Act, 1873.—*Division of Rates.*—When a complaint is made that a railway company do not allow a sufficient rebate from a cartage rate or gross rate, including the charge for collection and delivery of goods conveyed upon their line to those who cart to or from the company's stations for themselves, the application should as a general rule, in the first instance be for an order requiring the company to distinguish in the books kept at each of their stations, and open to the inspection of the public, how much of the rate is for the conveyance of the traffic on the railway, and how much is for other expenses, specifying the nature and details thereof, under sec. 15 of the Regulation of Railways Act, 1873. After such separation of the cartage rate from the gross rate, if the company do not allow to carriers performing the cartage the same amount as they charge to the public for such service when performed by the company; or, if the charge be made too low, for the purposes of preventing competition, the same amount as the service costs the company, any person injured by the insufficient allowance may apply to the commissioners for an injunction under sec. 2 of the Railway and Canal Traffic Act, 1854, or for an order under sec. 15 of the Regulation of Railways Act, 1873. *Quære*, whether the company are not bound to allow in such cases the charge made by them to the public for the same service, or in cases where that is not a satisfactory test, the actual cost to the company of the service, and any profit which may accrue thereon to the company, or be estimated by them in respect thereof. The company must allow to carriers for cartage of parcels, and empties the same amount which they charge to the public, and allow to their own agents in respect of such cartage. It is no ground of complaint that the company give credit to, or have a monthly ledger account with certain of their customers, and refuse the same to persons for whom goods are collected and delivered by carriers, unless it be shown that the difference was made for the purpose of preventing competition or of otherwise injuring the complainant. Goddard *v.* London & Southwestern R. Co., 1 Nev. & Mac. 308. See also Garton *v.* Bristol & Exeter R. Co., 1 Nev. & Mac. 218; Baxendale *v.* London and South Western R. Co. Ib. 231; Palmer *v.* London and Southwestern R. Co., Ib. 243; Palmer *v.* London, Brighton and South Coast R. Co., Ib. 271; Baxendale *v.* Bristol, and Exeter R. Co. Ib. 229.

Stamped and Unstamped Parcels—Undue Preference of themselves by a Railway Company.—A railway company had two scales of charges for the carriage of parcels by their line. One of the scales was much lower than the other, but was only applicable when the parcels to be carried by it fulfilled certain conditions as to size and value, and were prepaid by having adhesive stamps affixed to them. Both the scales included delivery from the railway company's receiving offices to their railway terminus. The railway company allowed their agent for carting parcels from their receiving offices to the railway terminus 1*d.* on every unstamped parcel and nothing on stamped parcels; the agent undertaking to cart the stamped parcels for nothing, in consideration of being unpaid 1*d.* on

CARRIERS—*Continued.*

every unstamped parcel. Upon complaint by a carrier who collected and carted stamped and unstamped parcels to the railway company's terminus, that although the trouble and expense was the same to him whether parcels were stamped or unstamped, yet the railway company allowed him nothing in respect of the former: *Held*, that the railway company had not given an undue preference either to themselves or to the person they employed as their carting agent, because they charged the public nothing for collection and the collection of stamped parcels cost them nothing, the carting agent consenting to carry stamped parcels gratis in consideration of being paid 1*d.* for every unstamped parcel. *Semble*, such an arrangement would be an undue preference over a carrier who only carted stamped parcels. Robertson *v.* Midland Great Western R. Co. (Ireland), 2 Nev. & Mac. 409; see, also, Thompson *v.* London & North Western R. Co., 2 Nev. & Mac. 115.

Undue Preference of Themselves by a Railway Company.—A railway company formerly charged a uniform rate of 3*s.* 6*d.* per ton on all goods conveyed on their line between R. and P. The goods were collected and delivered both by the company and B. at a charge of 4*s.* and 10*d.* per ton. The company, who had power under their acts to impose their own rates of charge for carrying, but no power to impose tolls for collecting and delivering, raised the charge for carrying to 8*s.* 4*d.*, being the aggregate of the above two charges, with an intimation to the public that they would collect and deliver goods free of all charge. The real purpose of this arrangement was to compel persons desiring to have their goods conveyed by the railway to employ the company to collect and deliver such goods, and thus to secure this business and the profits upon it to the company, as well as to exclude B. from competing with them in this department of business. *Held*, that this arrangement was an undue preference to the company in their separate capacity of carriers other than on the line of railway, and also an undue prejudice to B. Baxendale *v.* Great Western R. Co., 1 Nev. & Mac. 202.

A railway company charged certain rates for the conveyance of goods on their line from P. to B. The company who had formerly allowed a deduction in respect of goods delivered and received at the P. and B. stations (as expense of carting to and from such stations was thereby saved to the the company), discontinued making such allowance, in order to induce persons who sent goods by the railway to employ the company to collect and deliver such goods, and to exclude common carriers from competing in this with the company. *Held*, that though no profit was made by collecting and delivering the goods, the system of charge was an undue prejudice to those persons who did not wish to have their goods collected and delivered for them by the company. Garton *v.* Gt. Westn. R. Co., 1 Nev. & Mac. 214.

CATTLE.—See Southeastern R. Co. *v.* Railway Commissioners and the Corporation of Hastings, 2 Nev. & Mac. 464.

COAL RATES—Harborne R. Co. *v.* London & N. W. R. Co., 2 Nev. & Mac. 169; Jones *v.* N. E. R. Co., 2 Ib. 208.

COAL TRAFFIC.

COAL TRAFFIC.—See Local Board for District of Newington *v.* North-eastern R. Co., 3 Nev. & Mac. 48; Southwestern R. Co. *v.* Staines R. Co., Ib. 306; Watkinson and others *v.* Wrexham, Mold & Connah's Quay R. Co. (No. 3), Ib. 446; Victoria Colliery Co. *v.* Midland, Neath and Brecon R. Cos., Ib. 35; Locke *v.* Northeastern R. Co., Ib. 44; Denoby Main Colliery Co. *v.* Manchester, Sheffield & Lincolnshire R. Co., Ib. 426; Belfast Central R. Co. *v.* Great Northern R. Co., Ib. 419; Denaby Main Colliery Co. *v.* Manchester, etc., R. Co., 4 Ry. & Canal Traffic Cas. 28; Broughton, etc., Co. *v.* Great Western R. Co., Ib. 191; Neston Colliery Co. *v.* London, etc., R. Co., Ib. 257; Belfast Central R. Co. *v.* Great Northern R. Co., Ib. 159.

Duty Imposed on Imported Coal—Liability of Railway Company to Pay Duty.—A private act of parliament imposed a duty of 2*s.* per chaldron upon all coal "imported and landed at the town of H., or otherwise brought or delivered within the limits of the town." The act gave a remedy against the shipowner by distraining the ship and tackle, as well as the coals, in default of payment. At the time that the act was passed, no coals were brought into H. except by sea. *Held*, that coals brought into the town by railway were liable to duty, and that the railway company, as the persons who brought the coals into the town, were primarily liable to pay the duty. Great Eastern R. Co. *v.* Harwich, 41 L. T. 533.

Preference to Corporation.—In determining whether a preference shown by a railway company to one of its customers is undue or unreasonable within the meaning of the second section of the Railway and Canal Traffic Act, 1854, regard should be had to the benefit and convenience of the public, and also to the convenience of the railway company with reference to its general traffic. Therefore, when a railway company was compelled, by the increase of its business to separate its mineral from its goods traffic at O. station, and transferred the former to another station, retaining only at O. station the mineral traffic in favor of the corporation of M., who lighted M. and its suburbs, and whose gas-works were close to O. station, communicating therewith by a siding, so that such traffic could be removed at once from the O. station without impeding the goods traffic: The commission found as facts: that it was a matter of public benefit and convenience that the corporation should be supplied with coal at the O. station, and that the nature and magnitude of their supplies enabled the railway company to make such special arrangements for passing them through and out of O. station, with less inconvenience to the general and ordinary business thereof than would be caused by carrying for the applicants, and therefore held that the preference to the corporation was neither undue nor unreasonable. Lees *v.* Lancashire & Yorkshire R. Co., 1 Nev. & Mac. 352. See also Ransome *v.* Eastern Counties R. Co., Ib. 63; Oxlade *v.* Northeastern R. Co., Ib. 72; Harris *v.* Cockermouth & Workington R. Co., Ib. 97; Nicholson *v.* Great Western R. Co. (No. 1), Ib. 121; Same *v.* Same (No. 2), Ib. 143; Oxlade *v.* Northeastern R. Co. (No. 2), Ib. 162; West *v.* London & Northwestern R. Co., Ib. 166.

COAL TRAFFIC—*Continued.*

Terminal Charges—Extraordinary Services—Construction of Special Act.—M. R. Co. were authorized by their act to charge for coal carried in owner's wagons, a rate not exceeding *1d.* per ton per mile for conveyance, and for everything incidental to conveyance, and also reasonable sums for certain terminal and extraordinary services, viz., loading, covering and unloading of goods, delivery and collection, and any other services incidental to the business or duty of a carrier, where such services, or any of them, are or is performed by the company, and warehousing and wharfage of goods, or any other extraordinary services performed by the company. *Held*, upon the authority of the Lancashire & Yorkshire R. Co. *v.* Gidlow, that haulage and shunting in marshalling the traffic from collieries were services incidental to conveyance, and that back haulage of empty wagons was not a service for which a charge could be made under the clause above set out; but that providing, maintaining and working, signalling and interlocking apparatus at a junction with a colliery siding was an extraordinary service, within that clause, because it was a service from which the general public using the railway derived no benefit, but was performed for the benefit of the colliery proprietors alone, and that *3d.* per ton was a reasonable charge in respect of such service. *Held*, also, that providing of coal-shoots for unloading of coal wagons was a service within the above-mentioned clause, for which *2d.* per ton was a reasonable charge. Dunkirk Colliery Co. *v.* Manchester, Sheffield & Lincolnshire R. Co., 2 Nev. & Mac. 402.

Services Incidental to Business of Carrier.—A railway company were authorized by their special act to charge a sum for the conveyance of coal along the line, "including the tolls for the use of the railways and wagons or trucks and locomotive power, and every expense incidental to such conveyance," which sum was to be a maximum sum, except in certain cases, the exception being thus expressed: "Except a reasonable sum for loading, covering and unloading of goods, and delivery and collection, and any other services incidental to the business of a carrier, where such services, or any of them, are or is to be performed by the company." *Held*, that taking the wagons of a colliery owner from his own sidings and attaching them to the trains, or returning them from the line of the railway to the sidings of the colliery owner, were not services which came within the meaning of the exception. At some of the stations the colliery owner had been allowed to leave his coals on the ground adjoining the lines. *Held*, that this might have been made the subject of an agreement for payment of any advantage, but did not come within the description of a "service" contained in the exception. Lancashire & Yorkshire R. Co. *v.* Gidlow, L. R. 7. H. L. 517; 45 L. J. Ex. 625.

COLLECTION AND DELIVERY.—See Robertson *v.* Midland G. W. R. Co., 2 Nev. & Mac. 409; Manchester, etc., and Trent, etc., R. Cos. *v.* Guardians of Carstor & Glandford Brigg Unions, 2 Nev. & Mac. 53; Fishbourne *v.* Great Southern & Western R. Co., 2 Nev. & Mac. 224.

COLLECTION OF TRAFFIC.—See Watkinson *v.* Wrexham, etc., R. Co., 3

COLLECTION OF TRAFFIC—*Continued.*

Nev. & Mac. 5; Watkinson *v.* Wrexham Mold & Connah's Quay R. Co., Ib. 164; Same *v.* Same, Ib. 446; Thorsis Sulphur & Copper Co. *v.* London & Northwestern R. Co., Ib. 455.

COMMISSIONERS' PASSENGER REGULATION.—*Application to Freight Trains.*—The regulations of the railroad commissioners fixing the rates of fare for passengers who obtain tickets from the agents of the companies at their depots, as well as for those who do not, and prescribing the manner in which ticket offices shall be kept open before and at the arrival of trains, do not apply to freight trains, but only to regular passenger trains. Partee *v.* Georgia R. (72 Ga., 347), 27 Am. & Eng. R. R. Cas., 12.

COMMISSIONERS' REGULATION AMOUNTING TO REGULATION OF INTERSTATE COMMERCE.—An order of the board of railroad commissioners of the State of Iowa, made under the authority of the State, that a railway company shall so revise and alter its interstate distance tariff, so far as relates to freight shipped from points within the State to points without the State, and from points outside the State to points within the State, as to make it correspond to the Iowa local distance tariff, is contrary to sec. 8, art. 1. Const. U. S., and void. State *v.* Chicago & N. W. R. Co. (Iowa, Dec., 1866), 27 Am. & Eng. R. R. Cas. 15.

COMMON CARRIERS.—See Oxlade *v.* Northeastern R. Co. (No. 1), 1 Nev. & Mac.; and same (No. 2), Ib. p. 162.

COMPETITION.—See Garton *v.* Bristol & Exeter R. Co., 1 Nev. & Mac. 218; Baxendale *v.* Great Western R. Co., 1 Ib. 191; Netshill & Lesmahagow Coal Co. *v.* Caledonian R. Co., 2 Nev, & Mac. 39; Midland R. Co. *v.* Great Western R. Co., 2 Nev. & Mac. 88.

COMPETITIVE RATES.—See Midland R. Co. *v.* G. W. R. Co., 2 Nev. & Mac. 88; Bailey *v.* London, Chatham & Dover R. Co., 2 Ib. 99.

COMPETITIVE ROUTES.—See Sirhowy R. Co. with London & N. W. R. Co., 2 Nev. & Mac. 264; Central Wales, etc., R. Co. *v.* Great Northern R. Co., 4 R. & Canal Traffic Cas., 159; Marlborough, etc., R. Co. *v.* Great Western R. Co., Ib. 349.

COMPETITIVE STATIONS.—See Midland R. Co. *v.* G. W. R. Co., 2 Nev. & Mac. 88.

CONSIDERATION, ADEQUATE.—See Nicholson *v.* Great Western R. Co. (No. 1), 1 Nev. & Mac. 121.

CONSIGNMENT NOTE.—*Carrier—Instruction as to Delivery of Goods.*—F. & Co., carriers, delivered to a railway company, at their station, goods for conveyance, addressed to the consignees. With such goods a consignment note was handed to the railway company, containing, in addition to the names and addresses of the consignees, the words, "To the care of F. & Co." The railway company refused to recognize the latter words, and delivered the goods to the consignees by their own agents, or other carriers. *Held*, that the words, "To the care of F. & Co.," imported that the goods, on their arrival at the terminal stations, were to be given to F. & Co., or their agents, for delivery to the consignees; that, as between the railway company and F. & Co., the latter were the consignors, and that the rail-

CONSIGNMENT NOTE—*Continued.*

way company accepted the goods upon the terms stated in the consignment note; and that the railway company were precluded by the consignment note from being at liberty to employ their own or other carriers to deliver the goods from their railway to the consignees, and should have delivered the same to F. & Co., or their agents. Fishbourne *v.* Great S. & W. R. Co. (Ireland), 2 Nev. & Mac. 224.

CONSTRUCTION OF STATUTE.—See Watkinson *v.* Wrexham, Mold & Connah's Quay R. Co., 3 Nev. & Mac. 164; Caledonian *v.* North British R. Co. Ib. 56.

CONTINUOUS LINE OF RAILWAY.—See Victoria Colliery Co. *v.* Midland and Neath and Brecon R. Cos., 3 Nev. & Mac. 35; James and others *v.* Tiff Vale and Great Western R. Cos. Ib. 540; Hammons *et al. v.* Great Western R. Co., 4 R. and Canal Traffic Cas. 181; Uckfield Local Board *v.* London, Brighton & S. E. R. Co., 2 Nev. & Mac. 214.

CORRESPONDENCE OF TRAINS.—See Passenger Traffic, Innes, *v.* London, Brighton and London & S. W. R. Cos., 2 Nev. & Mac. 155; East London R. Co. *v.* London, Brighton & S. Coast R. Co., 2 Ib. 413.

COSTS.—See Baxendale *v.* London & Southwestern R. Co., 1 Nev. & Mac. 231: Marriott *v.* London & Southwestern R. Co., Ib. 47; Baxendale *v,* North Devon R. Co., Ib. 180.

Principle on which awarded.—See Nitshell and Lesmahagow Coal Company *v.* Caledonian R. Co., 2 Nev. & Mac. 46; Woodger *v.* Great Eastern R. Co., 2 Nev. & Mac. 104. A railway company having acted *bona fide* in the matter the subject of the injunction, and with no intention of prejudicing the complainants as rivals in trade with others, the injunction was granted without costs. Thompson *v.* London & N. W. R. Co., 2 Nev. & Mac. 115.

COST OF CONVEYANCE.—See Bellsdyke Coal Co. *v.* N. British R. Co., 2 Nev. & Mac. 105; Holland *v.* Festmiog R. Co., 2 Ib. 278; Thompson *v.* London & N. W. R. Co., 2 Ib. 185.

COVERED STATIONS.—See Caterham R. Co. *v.* Brighton and Southeastern R. Cos., 1 Nev. & Mac. 32.

DAMAGEABLE GOODS TRAFFIC.—See Thomas *v.* North Staffordshire R. Co., 3 Nev. & Mac. 1.

DAMAGE.—*Proof of.*—Upon application to the railway commissioners for an order restraining an infringement of the provisions of s. 2 of the Railway and Canal Traffic Act, 1854, it is not necessary to prove actual damage, if damage can be inferred from the circumstances. Denaby Main Colliery Co. *v.* Manchester, Sheffield & Lincolnshire R. C., 3 Nev. & Mac. 426.

DELAY IN EXERCISE OF RUNNING POWERS CAUSED BY BOARD OF TRADE.—Bristol & Exeter R. Co. *v.* Somerset & Dorset R. Co., 2 Nev. & Mac. 82; Midland R. Co. *v.* G. W. R. Co., 2 Ib. 88; Caledonian R. Co. *v.* Greenock & Wemyss Bay R. Co., 2 Ib. 122; Caledonian R. Co. *v.* N. British R. Co., 2 Ib. 285; Harborne R. Co. *v.* London & N. W. R. Co., 2 Ib. 325; Central Wales & Carmarthen Junction R. Co. *v.* G. W. R. Co., 2 Ib. 191.

DELIVERY OF GOODS.—*Carrier—Undue Preference of Company's Agent.*—Averments that a railway company refused to give effect to general orders left with them to deliver goods arriving at their stations by a particular carrier, and that the company refused to hand over goods for delivery by a particular carrier, to whose care they were addressed: *Held*, no relevant allegations of a contravention of the 2d section of the Railway and Canal Traffic Act, 1854, and therefore not sufficient to warrant the summary procedure provided for in the act. Wannan *v.* Scottish Central R. Co., 1 Nev. & Mac. 237.

Carrier—Undue Preference of Company's Agent.—The Great Western R. Co. had an office at Cirencester for the reception of goods to be carried by them on their railway, and an agent there, to whom goods arriving at the station addressed to persons residing in Cirencester, was intrusted for delivery on account and for the profit of the company. The complainant, a common carrier at Cirencester, complained that the company refused to recognize or act upon general orders signed by the consignees of goods, directing the company to hand over to him (the complainant) for delivery all goods which might arrive at the Cirencester station addressed to such consignees, but that they required him (the complainant) to produce on each occasion a special order describing the particular goods which the consignees desired to have delivered to them by him, no such special (or any) orders being required from their own agent. *Held*, that this was ground for an injunction under the Railway and Canal Traffic Act, 1854, sec. 2, it being an undue and unreasonable prejudice to the complainant in the conduct of his business of a carrier, and an undue preference and advantage to the company themselves. Parkinson *v.* Great Western R. Co., 1 Nev. & Mac. 280.

DELIVERY OF TRAFFIC.—See Watkinson and others *v.* Wrexham, Mold & Connah's Quay R. Co., 3 Nev. & Mac. 446; Thomas *v.* North Staffordshire R. Co., 3 Ib. 1.

DEMAND ON COMPANY TO REDRESS GRIEVANCE.—See Ilfracombe Public Conveyance Co. *v.* London & Southwestern R. Co., 1 Nev. & Mac. 61.

DEVELOPING TRAFFIC.—See Harborne R. Co. *v.* London & N. W. R. Co., 2 Nev. & Mac. 326.

DISCRIMINATION—*Act Prohibiting, held constitutional in Georgia.*—An act of the Legislature of the State of Georgia approved Oct. 14, 1879, entitled "an act to provide for the regulation of railroad freight and passenger traffics," etc. etc., forbade the railroad companies of the State from charging unfair and unreasonable rates of freight and fare, or making unjust discriminations for the transportation of passengers and freights; and provided for the appointment of a commission to prescribe reasonable and just rates of freight and passenger tariffs, to be observed by all the companies doing business in the State on the railroads thereof. *Held*, that such act was not in violation of either the constitution of the United States or of the State of Georgia; and that the question whether the rates prescribed by the legislature, either directly or indirectly, were just and reasonable, was one which, under the constitution of the State, the legis-

DISCRIMINATION—*Continued.*

lature might determine for itself. Tilley *v.* Savannah, etc., R. Co., 5 Fed. Reptr. 641; 1 Am. & Eng. R. R. Cas. 615.

Agreement to Discriminate in favor of certain elevators.—A railway company had entered into an agreement with the owners of certain elevators in Chicago not to deliver grain in bulk to any elevator except those owned by the parties agreed with, and an application was made for a *mandamus* by the owners of another elevator, not parties to such agreement, seeking by the writ to compel the railway company to deliver to said elevator whatever grain in bulk might be consigned to it upon its road. It was *held*, that the company could make no such injurious or arbitrary discrimination between individuals in its dealings with the public. C. & N. W. R. Co. *v.* People, 56 Illinois, 367.

Carrier may make Discrimination not unfair—What is unfair is for jury.—Railroad companies are not forbidden by the common law, or by the constitution and statutes of the State of Texas, to make a discrimination in their rates of freight. They are only forbidden to make an unjust discrimination. Whether in any particular case the discrimination has been unjust, is a question for the jury. Houston & Texas Central R. Co. *v.* Rust & Dinkins (Texas, 1882), 9 Am. & Eng. R. R. Cas. 123.

Carrier may resort to Discrimination in order to secure freight which he would otherwise lose.—A common carrier may discriminate in favor of persons living at a distance from the end of the route, where the object is to secure freight which would otherwise reach its destination by a different route, and other customers not in like condition will have no right of action because of the discrimination if the charges made against them are reasonable. Rogan *v.* Aiken (Tennessee, 1882), 9 Am. & Eng. R. R. Cas. 201.

Carrier not bound to carry at same price for all.—A common carrier is bound to carry for a reasonable remuneration, but is not bound to carry at the same price for all. Johnson *v.* Pensacola & Perdido R. Co., 26 Am. Rep. 731.

Charge of same rate per ton for transportation of coal from group of collieries several miles apart to same destination, amounts to.—Section 90 of the English Railways Clause Consolidation Act, 1845, provides that the toll charged by railway companies for the carriage of goods shall be charged equally to all persons and after the same rates, in respect of all goods of the same description "passing over only the same portion of the line of railway," and that no reduction or advance in any such tolls, either directly or indirectly, in favor of or against any particular person using the railway. A railway company carried coals to a point upon their railway from a group of collieries, placed along the line at varying distances from that point, and charged tolls at one rate per ton in respect of such carriage to all the members of the group. In an action for overcharges by the owner by the colliery lying nearest to the point of carriage, *held*, that the company had committed a breach of the provisions of section 90, which section applied notwithstanding that the termini of the transit over the company's line from the group to the point of carriage differed with

DISCRIMINATION—*Continued.*

respect to each colliery, and therefore that the company were liable in the action. Manchester, etc., R. Co., *v.* Denaby Main Colliery Co. (L. R. 12 Q. B. Div. 674), 18 Am. & Eng. R. R. Cas. 482.

Charges must be without favor or prejudice.—A railroad's charges for freight and passengers, although they may be changed from time to time, at the pleasure of the company, must be uniform without favor or prejudice, of the several classes established by the company. Chicago, etc., R. Co. *v.* Parks, 18 Ill. 460.

Common-law Rule, action for Discrimination practised in another State.—At common law, it is the duty of a common carrier, in the performance of his public service of transportation, not to make or give any undue or unreasonable preference or advantage to or in favor of any person, and not to subject any person to any undue or unreasonable prejudice or disadvantage, in respect to terms, facilities or accommodations; and such carrier is liable for the damage caused by a violation of this duty. This general rule of the common law is approved and confirmed by Gen. Stat., ch. 149. An action lies, in this State (N. H.) for damage caused by an unreasonable discrimination, practised in Maine, in violation of the law of that State on this subject. McDuffee *v.* Railroad, 52 N. H. 430.

Constitutional Provision as to.—Sec. 15, Art. 11, of the new constitution of Illinois, which provides that, "the general assembly shall pass laws to correct abuses and prevent unjust discrimination and extortion in the rates of freights and passenger tariffs on the different roads," etc., is a recognition of the fact that there may be discriminations which are not unjust, and by implication it restrains the power of the legislature to a prohibition of those which are unjust. Chicago, etc., R. Co. *v.* People, 67 Ill. 11.

Constitutional Provision Prohibiting—Extension of Facilities to rival line.—The provision in the constitution of Colorado that all individuals, associations, and corporations shall have equal rights to have persons and property transported over any railroad in that State, and no undue or unreasonable discrimination shall be made in charges or facilities for transportation of freight or passengers within the State, and no railroad company, nor any lessee, manager or employee thereof, shall give any preference to individuals, associations, or corporations in furnishing cars or motive power," imposes no greater obligation upon a railroad company than the common law would have imposed upon it. The provision of the constitution of Colorado, that "every railroad company shall have the right with its road to intersect, connect with, or cross any other railroad," only implies a mechanical union of the tracks of the roads so as to admit of the convenient passage of cars from one to the other, and does not of itself imply the right of connecting business with business. At common law, a railroad carrier is not bound to carry beyond its own line; and if it contracts to carry beyond it, it may may, in the absence of statutory regulations, determine for itself what agencies it will employ; and there is nothing in the provisions of the constitution of Colorado which takes away such right, or imposes any further obligation.

DISCRIMINATION—*Continued.*

A railroad company has authority to establish its own stations for receiving and putting down passengers and merchandise, and may regulate the time and manner in which it will carry them, and in the absence of statutory obligation, it is not required in Colorado to establish stations for those purposes at a point where another railroad company has made a mechanical union with its road. A provision in a State constitution which prohibits a railroad company from discriminations in charges and facilities, does not, in the absence of legislation, require a company which has made provisions with a connecting road for the transaction of joint business at an established union junction station to make similar provisions with a rival connecting line at another near point on its line at which the second connecting line has made a mechanical union with its road. A provision in a State constitution, which forbids a railroad company to make discrimination in rates is not violated by refusing to give to a connecting road the same arrangement as to through rates which are given to another connecting road, unless the conditions as to the service are substantially alike in both casess. Atchison, etc., R. Co. *v.* Denver, etc., R. Co. (110 U. S. Reptr. 607), 16 Am. & Eng. R. R. Cas. 57; reversing Denver, etc., R. Co. *v.* Atchison, etc., R. Co., 9 Am. & Eng. R. R. Cas. 374; Same *v.* Same, 12 Ib. 1.

Contract for, Cannot be Enforced.—Railroad corporations are common carriers, and they occupy a peculiar relation to the public as invested with certain franchises for the public benefit, and they are bound to use them with fairness and for the common good. A common carrier owes an equal duty to all, and it cannot be discharged if he is allowed to make unequal preferences, and thereby prevent or impair the enjoyment of the common right. A contract of a railroad company which gives to certain persons an exclusive advantage or monopoly over all other transporters in the transportation of goods, is unjust, and cannot be legally enforced. In the grant of a franchise of building and using a public railway, there is an implied condition that it is held as a *quasi* public trust for the benefit of the public, and the company possessed of the grant must exercise a perfect impartiality to all who seek the benefit of the trust. Messenger *v.* Penn. R. Co., 18 Am. Rep. 754.

Different Charges for Delivery at Different Warehouses.—A railroad company, although permitted to establish its rates of transportation, must do so without injurious discrimination as to individuals. And when it has fixed its rates for the transportation of grain, from any given station, on the line of its road, to Chicago, it will not be permitted, on the grain being taken there, to charge one rate for delivery at the warehouse of one person, and a different rate for delivery at that of another, both warehouses being upon its line or side tracks. Vincent *v.* C. & A. R. Co., 49 Ill. 34.

Dissimilarity of Circumstances.—The Great Western Railway Co., by its act of incorporation, 5 and 6 W. IV. c. Civil, was empowered to charge certain rates and tolls for the use of their railway and the carriage of

DISCRIMINATION—*Continued.*

goods and passengers thereon. By a subsequent act 2 Vict. c. 27, § 24, it was provided that these rates and tolls should be at all times charged equally to all persons and after the same rate per mile, or per ton per mile in respect of all passengers and all goods, etc., of a like description, and conveyed or propelled by a like carriage or engine passing on the same portion of the line, and that no reduction or advance should be made either directly or indirectly in favor of or against any particular company travelling upon or using the same portion of the railway. By the 7 and 8 Vict., c. 3, s. 48, the last mentioned provision was repealed, and in terms reënacted by s. 49, and by s. 50, it was enacted that it should be lawful for the company whenever they should act as carriers, or should provide power or carriage for the conveyance of passengers and goods, etc., to charge for such power and carriages such sum (not exceeding certain limits), and that either per ton or per mile by bulk measure, number or admeasurement, or by fixed charges, as they should think expedient; provided that in whatever way the charges were made, they should be made equally to all passengers and to all persons in respect to all goods, etc., of a like description and quality, and conveyed in or propelled by a like carriage or engine passing only over the same portion of and over the same distance along the railway and under the like circumstances; and that no reduction or advance in any of such charges should be made partially, either directly or indirectly, in favor of or against any particular company or person; *held*, that the fact of the person sending the goods to be conveyed along the railway being a carrier, did not constitute such a dissimilarity of circumstances as to justify a difference of charge as between him and the rest of the public. Edwards *v.* Great Western R. Co., 11 C. B. 558.

Elevators.—A railway company may, under Minnesota Statutes (ch. 31, Gen. Laws, 1874; Gen. Stat. 1878, c. 124, §§ 7, 8), furnish a suitable warehouse, at any of its stations, for the handling of grain to be shipped over its road, and may designate such warehouse as the exclusive place of delivery of such grain, and refuse to receive it, or to furnish cars for its shipment, at any other place. But it cannot lawfully designate an elevator owned by a private person as such place of exclusive delivery or receipt of grain. A railway company, operating an elevator at one of its local station as the exclusive place of receiving and delivering grain at such stations, cannot lawfully require a shipper of grain, who delivers it there, to accept a receipt providing that if, for any reason, it shall become necessary to remove the grain, the company reserves the right to deliver it from any other elevator or warehouse operated by the company, subject to the same rate of freight to terminal points as the present tariff from the local station, where the grain is delivered, to the terminal points where it is destined to go; nor can it subject the grain to a compulsory charge for clearing. Rhodes *v.* N. P. R. Co., 21 Am. & Eng. R. R. Cas. 31.

Exclusive Privilege.—Contract granting Monopoly of Carrying Locomotives void.—An agreement was entered into between the Erie R. Co.

DISCRIMINATION—*Continued.*

and a firm—Kasson & Co.—who owned, and were desirous to construct, certain cars, of an unusual size and weight and capacity, wherever locomotive engines and tenders could be conveyed. It was agreed, that if such cars and trucks, sufficient in strength and weight and capacity should be placed on the road, they should be patronized and used for the purpose of carrying all locomotive engines and tenders over the road of the Erie R. Co., the railway company agreeing to furnish the locomotive power at a certain consideration per mile. And it was further agreed that, in the words of the articles, "In consideration of the large expense incurred, and to be incurred, by the said party of the second part, under this contract, it is agreed by the Erie R. Co. that the cars of the said party of the second part shall be the only cars employed in the conveying of locomotive engines and tenders, as aforesaid." Shortly after the making of this agreement, the contract was, for value received, transferred and assigned to the Union Locomotive and Express Co., a corporation of the State of New York; they agreeing to keep and perform all the stipulations and agreements, on the part of Kasson & Co., in said contract. Subsequently the Erie did not abide by the agreements of the contract. Suit was brought for such breach of their promise. It was insisted, in defence, that such a stipulation gave the plaintiffs the exclusive control, on their own terms, of this branch of business; that it precluded all competition, and, being the grant of a monopoly, was inconsistent with the purposes and objects of the charter of the defendants, and with their character as common carriers, and was, therefore, void. The illegality of that part of the contract was conceded. It was *held*, however, that the defendant had agreed to do two things, *i.e.*, to allow the plaintiffs to transport locomotives and tenders over their road as mentioned, and also to grant them this privilege exclusively, and that the illegality of the latter stipulation did not render the former, which was lawful, the less binding. Judgment for plaintiffs. Erie R. Co. *v.* The Union Locomotive and Express Co., 35 N. J. L. 240.

Facilities—Express Companies.—A railroad company was required, in its act of incorporation, to transport, in the order in which they shall be requested, "All goods, wares, minerals, and merchandise, and other articles which shall have been deposited at the company's depots, or convenient to the said road, so that equal and impartial justice shall be done to all owners of property, who shall pay or tender to the officers of the company, the toll and freight due under this act on the goods, wares, minerals, and merchandise, or other articles which they may wish transported." *Held*, that express companies had as good a right to the benefits of the road as the owners of the packages which they conveyed personally had; but that a contract giving to one express company the exclusive right of transportation in the passenger trains was illegal and void. Sandford *v.* R. Co., 24 Penn. St. 378.

A railroad cannot discriminate in its own favor in the conduct of the express business; nor can it exercise a supervision over a rival company

DISCRIMINATION—*Continued.*

in the conduct of such business. An express company is entitled to some notice from a competing railroad of an intended change in rates and privileges in the conduct of the express business. Southern Express Co. *v.* L. & N. R. Co., 4 Fed. Rep. 481.

A temporary injunction granted to enjoin a railroad company from charging a certain express company higher rates than were charged to other specified companies by the same railroad. Southern Express Co. *v.* Memphis, etc., R. Co., 8 Fed. Rep. 799.

Railroad companies are bound, as common carriers, to allow express companies to do business on their roads, and to provide such conveyances, by special cars or otherwise, attached to their trains, as are required for the safe and proper transportation of express matter; and they are bound to extend the use of such facilities, on equal terms, to all who are engaged in the express business. Southern Express Co. *v.* St. Louis, Iron Mountain & S. R. Co., 10 Fed. Rep. 210.

Overruled. See St. Louis, etc., R. Co. *v.* Southern Ex. Co., 118 U. S. 1; s. c., 23 Am. & Eng. R. R. Cas. 545.

The defendants contracted with the Eastern Express Co. to give the latter a certain share in the baggage and mail car attached to passenger trains, for the carriage of their goods, and agreed not let any other persons or express carriers have similar facilities, during the continuance of the contract. Plaintiffs, another express company, offered packages to be transported on defendant's passenger trains, which the defendant refused to receive or transport. *Held*, that defendants were liable. New England Express Co. *v.* Maine Central R. Co., 2 Am. Rep. 31.

Three railway companies, desiring that the express business should be done on their lines, agreed with the Adams and Southern express companies that they should perform the service under a contract which could be terminated by either party upon notice given to the other. Under this contract the express companies came upon the roads and did the express business. Some years afterwards two of the railway companies concluded to do their own express business. They so notified the express companies, and excluded them from the road. The third railway company at the same time concluded it could employ another express company, the Pacific, to do its express business cheaper than the express companies, complainant herein had been doing it, and so notified that company of its intention to terminate the contract, to employ another express company, and to exclude the first company from the road. At the same time the railway companies averred their willingness to carry express matter for the excluded companies, but not to afford them the special facilities which they enjoyed under their contracts. Thereupon the excluded express companies filed bills in equity to compel the railway companies to permit them to do the express business on the roads, and to afford to them the same facilities for it as the railway companies gave to themselves or any other express companies. *Held* (1), that while, as admitted by the railway companies, it was their duty to carry express matter for the public,

DISCRIMINATION—*Continued.*

yet that the companies could choose their own appropriate means (agencies) of such carriage, always providing they are such as to insure reasonable promptness and security. (2) That the express companies which did the express business on the railways had done it only by permission under special contracts by which they had been given admission to the roads as a privilege, and not as a right. (3) That although the express companies had invested large sums of money and had built up a large business under their contracts with the railway companies, they had done so understanding the uncertainty of their privileges under the fact that the contracts could be terminated upon notice, and that the stoppage of their facilities was one of the risks they assumed when they accepted their contracts, and made their investments under them. (4) That while usage and the common law might compel a railway company to carry express matter, there was no usage that would compel it to employ particular companies to do its express business. (5) That the court could not make a contract for the parties by prescribing the facilities which should be given the complaining express companies and the rates, times, etc., of payment therefor. St. Louis, etc., R. Co. *v.* Southern Express Co. (118 U. S. 1) 23 Am. & Eng. R. R. Cas. 545.

Where the Maine Central R. Co. let to the Eastern Express Co., for four years, the exclusive use of a certain separate apartment in a car attached to each of their passenger trains, for the purpose of transporting the express company's messenger and merchandise, and agreed that they would not, during the continuance of such contract, let any space in any car on any of their passenger trains, to any other express carrier; and the railroad company before the expiration of such contract, but after reasonable notice to them, refused to receive upon any terms, from the New England Express Co., when and where they received the Eastern Express Co.'s freight, such packages as are usually carried by express companies, to be transported by their passenger trains: *held*, that the railroad company were liable, under c. 193 of the Public Laws, 1868, to the New England Express Company, in an action for damages. It seems that an action at common law would lie against the railroad under the same circumstances. New England Express Co. *v.* Maine Central R. Co. 57 Maine, 188.

Illegality of Discriminative Rate.—The Pennsylvania Railroad Company, who were defendants in the action, agreed with the plaintiffs to carry certain merchandise for them, between certain termini, at a fixed rate less than they should carry between the same points for any other person. The allegation was that goods had been carried for other parties at a certain rate below what the goods of the plaintiffs had been carried, and suit was brought to enforce the foregoing stipulation. The question was, whether the agreement thus forming the foundation of the suit was legal.

Per BEASLEY, C. J.—"There can be no doubt that an agreement of this kind is calculated to give an important advantage to one dealer over other dealers, and it is equally clear, that if the power to make the present engagement exists, many branches of business are at the mercy of

DISCRIMINATION—*Continued.*

these companies. A merchant who can transport his wares to market at a less cost than his rivals, will soon acquire, by underselling them, a practical monopoly of the business; and it is obvious that this result can often be brought about if the rule is, as the plaintiffs contend that it is, that these bargains giving preference can be made. . . . I am unable to see how it can be admissible for a common carrier to demand a different hire from various persons for an identical kind of service, under identical conditions. Such partiality is legitimate in private business, but how can it square with the obligations of a public employment? A person having a public duty to discharge, is undoubtedly bound to excise such office for the equal benefit of all; and therefore, to permit the common carrier to charge various prices, according to the person with whom he deals, for the same services, is to forget that he owes a duty to the community. . . . The law which forbids him to make any discrimination in favor of the goods of A over the goods of B, when the goods of both are tendered for carriage, must, it seems to me, necessarily forbid any discrimination with respect to the rate of pay for the carriage." *Held*, that an agreement by a railway company to carry goods for certain persons at a cheaper rate than they will carry under the same conditions for others, is void as creating an illegal preference. Messenger *v.* Pennsylvania R. Co., 36 N. J. L. 407.

Inequality of Charge.—A company being under an agreement with one Kent to make him an allowance of 10 per cent upon the sums paid by him for carriage of goods in consideration of services rendered by him, and having discontinued that allowance by reason of a former decision of this court, Kent sued them for their breach of contract, and they compromised that action and paid him £500 to cancel the agreement. *Held*, that this did not constitute an inequality of charge as between Kent and other carriers. Edwards *v.* Great Western R. Co., 11 C. B. 588.

Freight Rates.—A railroad company organized under the statutes of Ohio is a common carrier of freights, and is subject to judicial control to prevent the abuse of its powers and privileges. Where a lower rate is given by such corporation to a favored shipper, which is intended to give, and necessarily gives, an exclusive monopoly to the favored shipper, affecting the business and destroying the trade of other shippers, the latter have the right to require an equal rate for all under like circumstances. Where such a corporation, as a common carrier of freights, in consideration of the fact that a shipper furnished a greater quantity of freights than other shippers during a given term, agrees to make a rebate on the published tariff on such freights, to the prejudice of the other shippers of like freights under the same circumstances, *held*, such a contract is an unlawful discrimination in favor of the larger shipper, tending to create monopoly, destroy competition, injure, if not destroy, the business of smaller operators, contrary to public policy, and will be declared void at the instance of parties injured thereby. Such a contract of discrimination cannot be upheld simply because the favored shipper may furnish for

DISCRIMINATION—*Continued.*

shipment during the year a larger freightage in the aggregate than any other shipper, or more than all others combined. A discrimination resting exclusively on such a basis will not be sustained. Although a court will ordinarily look to the interest of a common carrier as an element in the case when a contract with him relating to freightage is attempted to be upheld or set aside, such a contract will not be sustained by the court simply because the business to be done under it is "largely profitable" to him. Where it appeared that the plaintiffs' business was such as to make them frequent shippers, and that a continuous series of shipments was necessary in conducting their business, and that a remedy sought by actions at law would lead to a multiplicity of suits, *held*, the court will intervene by injunction to prevent a multiplicity of suits, and it is not a prerequisite that the plaintiffs should have first established their rights by an action at law. Where a defendant railroad company is a corporation consolidated under the statutes of several States, including this State, and its road extends into several States, *held*, that its acts of injurious discrimination committed or threatened in this State to the business of shippers, either here or along the line of its railroad in this State, may be enjoined by the courts of this State. Scofield *v.* Lake Shore & M. S. R. Co., 23 Am. & Eng. R. R. Cas. 612.

Joint Action—Community of Interest.—Three plaintiffs filed a joint-bill against a railroad company, averring injury to their business in charging improper tolls, making discriminations against them, etc. *Held*, That a community of interest in the plaintiff was necessary to sustain the bill. The Cumberland Valley R. Co.'s Appeal, 62 Penn. St. 218.

"Local" and other Freights—Federal Constitution does not Prohibit Discrimination between.—The defendant railway company has power under the Tonnage Commutation Act of March 7, 1861, to discriminate between rates charged for carrying "local freight," and the rates charged for other freight. The Constitution of the United States does not prohibit a discrimination between local freight, and that which is extra-territorial when it commences its transit: the distinction is not personal, and therefore not within the prohibition. Shipper *v.* Pennsylvania R. Co., 47 Pa. St. 338.

No Right to make Discrimination in Rates of Freight based on Amount Shipped.—The plaintiffs were engaged in mining coal at Salineville, Ohio, for sale in the Cleveland market. They were wholly dependent on the defendant for transportation. The regular tariff between those points was $1.60 per ton, with a rebate of from 30 to 70 cents per ton to persons shipping over 5000 tons during a year; the whole amount of rebate being graduated according to the quantity shipped. Under this schedule plaintiffs were required to pay higher rates on the coal shipped by them than were exacted from other and rival parties, who shipped larger quantities. The defendant claimed that the discriminations were made in good faith, to stimulate production and increase its tonnage, and were within the discretion confided by law to every common carrier. In an

DISCRIMINATION—*Continued.*

action to recover back the excess of tariff paid by plaintiffs, *held*, that such discriminations were illegal, and that plaintiffs were entitled to recover the amount paid by them in excess of the rate accorded to their most favored competitor, with interest thereon. Hays *v.* Pennsylvania Co., 12 Fed. Reptr. 309; 6 Am. & Eng. R. R. Cas. 594.

Preference of Employees.—A railroad company cannot discriminate in favor of itself or any of its employees as against other transporters. Cumberland Valley R. Co.'s Appeal, 62 Pa. St. 218.

Rate Proportionately less for Greater Distance—Competition of Canal with Rail Line of Railway.—By a Canal act the company of proprietors were entitled to demand a fixed sum for goods carried upon any part of the canal, "which said respective rates shall be equal throughout the whole length of the said intended canal." By a subsequent public act, 8 & 9 Vict. c. 28, proprietors of canals were empowered from time to time to alter or vary the tolls granted to them "either upon the whole or for any particular portion or portions of such canals, according to local circumstances, or the quantity of traffic or otherwise as they should think fit," with a proviso that such tolls were to be charged equally to all persons, and after the same rate, whether per mile, or per ton per mile, in respect of all boats, etc., of the like description passing along or using the same portion of the said canal, and all goods, etc., of the like description conveyed or propelled in a like boat, etc., passing along or using the same portion of the said canal, etc., under the like circumstances, etc. *Held*, that it was competent to the company to take a proportionally less toll per ton per mile for goods carried a given distance (five miles) along any part of the canal than for goods carried less than that distance. Also, that it was competent to the company to agree to carry at a lower rate for a particular individual, in consideration of a large guaranteed minimum toll, in order to enable them to enter into a successful competition with a rival line of railway. Strick *et al. v.* Canal Company, 16 C. B. Rep. (N. S.) 344.

Redress may be sought by Injunction—Carrier cannot bind itself to Deliver All Stock to One Stock-yard.—Railroad corporations are *quasi* public corporations, dedicated to the public use. In accepting their charters, they necessarily accept them with all the duties and liabilities imposed upon them by law. Thus a *quasi* public trust is created which clothes the public with an interest in the use of railroads, and the latter can be controlled by the courts to the extent of the interest of the public therein. In the absence of some statute providing another and different remedy, courts of equity have jurisdiction to compel railroad corporations to discharge the duties imposed upon them by law; and persons injured by the wrongful action or non-action of such corporations may seek redress by injunction, and are not bound to resort to proceedings in *mandamus* or to an action at law for damages. A railroad company cannot bind itself to deliver to a particular stock-yard all live stock coming over its line to a certain point; but it is bound to transport over its road and deliver to all stock-

DISCRIMINATION—*Continued.*

yards at such point, reached by its tracks or connections, all live stock consigned, or which the shippers desire to consign to them, upon the same terms and in the same manner as, under like conditions, it transports and delivers to their competitors; and the performance of this duty may be compelled by injunction at the suit of the proprietors of the stock-yards discriminated against. McCoy *v.* C. I. & St.L. R. Co., 13 Fed. R. 3.

Station Agents—Facilities.—In an action by an express company against a railway company and another express company to whom certain privileges were granted by the railway company which were withheld from the plaintiffs, the principal one being that of employing the railway station agents to act as agents of the defendant express company, and in which it was also claimed that the rates charged by the railway company to the plaintiffs were unreasonable, *held*, that even if the court had jurisdiction to inquire into the reasonableness of the rates, which was doubtful, no collusion being shown between the defendant companies, it would not on the record and evidence in this case do so. *Held*, also, that the employment of the station agents of a railway company to act as agents of express companies, with the privilege they had at the stations, is a "facility" within the meaning of the Consolidation Railway Act of 1879, 42 Vic., c. 9, s. 60, sub.-s. (D.), and that when such privilege is granted to one express company and refused to another, whether by contract or obligatory arrangement or not, it is an illegal bargain in contravention of the third subdivision of the act. Vickers Express Co. *v.* Canadian P. R. Co., 21 Am. & Eng. R. R. Cas., 18 (9 Ontario, 251).

Statute Penalty.—The statute of Iowa, ch. 77, § 13, acts of seventeenth general assembly, providing a penalty of triple damages for "extortion or unjust discrimination," only applies to extortion or unjust discrimination by extortionate or discriminative rates, and not to extortion or failure by reason of failure to furnish cars or means of transportation. This statute being penal, must be construed strictly. Bond *v.* Wabash, St. Louis & Pacific R. Co. (Iowa, Dec. 1885), 23 Am. & Eng. R. R. Cas. 608.

Statutes Prohibiting Discrimination—Interstate Commerce.—The provisions of the statute of Rhode Island prohibiting discriminations by common carriers in the transportation of merchandise are applicable to contracts made in Rhode Island for the carriage of merchandise to points outside of Rhode Island on the line of defendant's road. These provisions of the statute are not regulations of commerce within the meaning of the "commercial clause" of the Federal Constitution, nor does the construction given in this case to such provisions of the statute conflict with that clause of the United States Constitution. Providence Coal Co. *v.* Providence & Worcester R. Co. (Rhode Island, May, 1886), 26 Am. & Eng. R. R. Cas. 42.

Unreasonble Rates.—The rule for forbidding unreasonable charges and unjust discriminations being a common-law rule, railroad companies, by accepting their testimony, take them with this implied limitation upon the power, granted in general terms, to establish their rates of freight.

DISCRIMINATION—*Continued.*

Such charters are granted for the purpose of furnishing improved means of transportation and travel to all persons, without unjust discriminations between individual communities, and when accepted, it is with the knowledge that the nature of the grant imposes these obligations. Chicago, etc., R. Co. *v.* People, 67 Ill. 11.

What is Unjust.—The establishment permanently of less rates of freight at points of competition with other roads than is fixed at other places for the same distance, cannot be justified by showing that the rates charged at competing points are reasonably low. Even if the higher rates are reasonably low, when regarded with reference to the profit upon the capital invested in the road, they are not reasonable in the true sense of the term if no satisfactory reason can be given for charging less rates for the same or greater services to persons at other stations. Such corporations should not use their power to benefit particular individuals, or build up particular localities by arbitrary discriminations in their favor that must cause injury to other persons or places engaged in rival pursuits, or occupying rival positions. Chicago, etc., R. Co. *v.* People, 67 Ill. 11.

What Legislation in respect to would be Proper and Constitutional.—An act prohibiting railroad companies from making any unjust discriminations in their charges for transporting freights, making the charging of a greater compensation for a less distance or for the same distance, merely *prima facie* evidence of unjust discrimination instead of conclusive evidence, and giving such companies the right of trial by jury, not only of the fact of discrimination, but also upon the issue whether such discrimination is just or not, is within the unquestionable power of the legislature and would be subject to no constitutional objection. Chicago, etc., R. Co. *v.* People, 67 Ill. 11.

DISTINGUISHING RATES.—See Bailey *v.* London, Chatham & Dover R. Co., 2 Nev. & Mac. 99; Harborne R. Co. *v.* London & N. Western R. Co., 2 Ib. 169; Robertson *v.* G. S. & W. R. Co., 2 Ib. 374; Robertson *v.* Midland G. W. R. Co., 2 Ib. 409.

DISTRICT.—See Caledonian R. Co. *v.* North British R. Co., 2 Nev. & Mac. 285.

DIVERSION OF TRAFFIC.—See Sirhowy R. Co. with London & N. W. R. Co., 2 Nev. & Mac. 264; Central Wales, etc., R. Co. *v.* London, etc., R. Co., 4 R. and Canal Traffic Cas. 101; Hammans *et al. v.* Great Western R. Co., Ib. 181.

DIVISION OF RATES.—See Goddard *v.* London & Southwestern R. Co., 1 Nev. & Mac. 308.

DOCK.—*Sea Traffic—Navigation.*—The Manchester, Sheffield & Lincolnshire R. Co. were the proprietors of the Grimsby Old Dock, and also of another dock called the Grimsby New Dock, communicating with their railway. By act of parliament the company was authorized and required to maintain the old dock and the approach thereto of a given depth. *Held*, that the failure to perform this duty, so that the dock and its approach became silted up, and the depth of water therein insufficient for

DOCK—*Continued.*

vessels to get to the wharfs adjoining, was not the subject of redress under the Railway and Canal Traffic Act, 1854, although it was suggested that the object of the company was to discourage the traffic to the old and to divert it to the new one. And *semble*, that the dock or haven was not a canal or navigation within the statute.

Per Byles, J.: The act refers to preferences given to one person or class of persons over another in the traffic along the same railway or canal. Bennett *v.* The Manchester, Sheffield & Lincolnshire R. Co., 1 Nev. & Mac. 288. See generally Manchester, etc., and Trent, etc., R. Cos. *v.* Guardians of Caistor and Glandford Brigg Unions, 2 Nev. & Mac. 53.

DUE AND REASONABLE FACILITY.—*Alternate Route—Diversion of Traffic—Railway and Canal Traffic Act*, 1854, *s.* 2.—The existence of through booking and through rates over one route which is 56 miles longer than another route, of which the applicant company's line (which is run over and used under an agreement by the L. & N. W. R. Co.) forms a part, is no ground for an application against the L. & N. W. R. Co. under sec. 2 of the Railway and Canal Traffic Act, 1854. Central Wales, etc., R. Co. *v.* London & N. W. R. Co., 4 R. and Canal Traffic Cas. 101.

Branch Railway—Railway Clauses Consolidation Act, 1845, *s.* 76—*Railway and Canal Traffic Act*, 1854, *s.* 2.—Where it is doubtful whether a junction which is sought by applicants as a reasonable facility would be allowed by the Board of Trade to be used, if ordered by the commissioners and constructed by the company; and where the mode of working such junction would be unsatisfactory and obstructive to the other traffic on the main line, such a junction is not a due facility within the meaning of sec. 2 of the Railway and Canal Traffic Act, 1854. An injunction to a company to work traffic will only be issued where there is a well-founded ground of complaint in respect of past working, and the question of proper facilities for the receipt, etc., of the traffic at a junction does not arise until a junction exists. If a junction could not be reasonably worked when constructed, a company could not be enjoined to construct it as a reasonable facility. Dublin Whiskey Distillery Co. *v.* Midland Great Western of Ireland R. Co., 4 R. and Canal Traffic Cas. 32.

Continuous Line of Communication—Diversion of Traffic—Railway and Canal Traffic Act, 1854, *s.* 2.—The S. & M. Co. were the owners of a railway in two sections connected by lines belonging to two other companies which were worked by the Great Western R. The S. & M. Co. did not work or book traffic between their two sections, and the Great Western R. Co. did not book from the stations on the lines worked by them to stations on either section of the S. & M. Co.'s railway. To permit of the exchange of traffic required by the applicants, sidings and other accommodation at one of the junctions were necessary. *Held*, that the failure to provide these between the 25th of April and the 29th of June, during which time the companies were considering the alterations which were necessary to enable the S. & M. Co. to exercise their running powers over these connecting lines, was not a failure to provide facilities for receiving,

DUE AND REASONABLE FACILITY—*Continued.*

forwarding and delivery of traffic. *Held*, that the route, until so completed and sanctioned by the Board of Trade, was not a continuous line of railroad communication. The junction between the northern section of the S. & M. Co.'s railway and that of the M. Co. was at M., and it was physically complete, but was not opened because the S. & M. Co. had not given the necessary notice; as the application asked for an order against the Great Western Co. only, an injunction was refused. It is no answer to the public desirous of using railways as a continuous line that there are disputes as to the rights of the companies *inter se.* The commissioners will not make an order on a complaint of diversion of traffic where the number of instances of diversion is so small, in proportion to the amount of traffic not diverted, as to show that the traffic was miscarried merely by inadvertence or mistake. Hammans *et al. v.* Great Western R. Co., 4 R. and Canal Traffic Cas. 181.

Running Powers—Railway and Canal Traffic Act, 1854, *s.* 2.—It is doubtful whether the facilities necessary to enable a company to work its traffic over the railway of another company, or, in other words, to exercise its running powers, are facilities an owning company are bound to provide under the Railway and Canal Traffic Act, 1854, unless the matters required are such as are necessary to keep their own line in a proper condition for the receipt, forwarding, and delivery of traffic. Swindon, etc., R. Co. *v.* Great Western R. Co. *et al.*, 4 R. & Canal Traffic Cas. 173.

Station Accommodation—Foot Bridge to Station—Railway and Canal Traffic Act, 1854, *s.* 2.—The Railway and Canal Traffic Act, s. 2, does not compel a railway company to find reasonable accommodation for the public further than it is in the interests of railway traffic that it should be found. An application to the commissioners under that section to order a railway company to construct a foot-bridge over their railway in their station at H. for the more convenient ingress and egress of foot-passengers from and to the town, refused, on the ground that such a bridge was not a due and, reasonable facility under the circumstances. Holyhead Local Board *v.* London & N. W. R. Co., 4 R. and Canal Traffic Cas. 37.

EASEMENT.—See Bristol & Exeter R. Co. *v.* Somerset & Dorset R. Co., 2 Nev. & Mac. 82.

EJUSDEM GENERIS.—See Postmaster-General *v.* Highland, R. Co., 2 Nev. & Mac. 34.

ENGINE.—*Fitness of Locomotives to be used on a railway under running powers.* E. & W. Junction R. Co. *v.* Northampton & Banbury Junction R. Co., 2 Nev. & Mac. 293.

EQUALITY CLAUSE.—See Woodyer *v.* Great Eastern R. Co., 2 Nev. & Mac. 102.

The word "tolls" in sect. 90 of the Railways Clauses Consolidation Act applies to traffic generally, and is not limited to tolls strictly so called. Evershed *v.* London & N. W. R. Co. 3 App. Cas. 1022; 48 L. J. Q. B. (H. L.) 22.

EQUALITY OF CHARGE.—*Carriers—Competition.*—It is not a legitimate ground for giving a preference to one of the customers of a railway com-

EQUALITY OF CHARGE—*Continued.*

pany that he engages to employ other lines of the company for the carriage of traffic distinct from and unconnected with the goods in question; and it is undue and unreasonable to charge more or less for the same service, according as the customer of the railway thinks proper or not to bind himself to employ the company in other and totally distinct business. Baxendale *v.* Great Western R. Co., 1 Nev. & Mac. 191; Caterham R. Co. *v.* Brighton and Southeastern R. Cos., Ib. 132.

Carrier—Special Agreement—Guarantee of Quantity—Through Rate.—The S. E. R. Co. entered into aspecial agreement with Messrs. F. by which the latter guaranteed to send between Boulogne Quay and London by the S. E. R. Co.'s. steamers and railway 850 tons of goods each calendar month. In consideration of the agreement, the railway company allowed Messrs. F. a rebate of 15 per cent off their tariff of station-to-station rates, exempted them from a landing charge at Folkestone of 4*d.* a package, payable to the railway comopany on goods of particular descriptions and charged them from 6*d.* to 1*s.* less than others on parcels exceeding 56 lbs. in weight. *Held*, that as there were circumstances which enhanced the value to the railway company of the guaranty of quantity, and compelled Messrs. F. to incur considerable expense and labor to earn the allowance, and as the railway company had always been ready to make a proportionate allowance for a smaller amount of traffic to any one giving a guarantee similar (except as to amount), no injunction should be granted. The S. E. R. Co. carried goods at agreed through rates between London and Paris, as to which the railway companies undertook, for the fixed amount paid, every kind of service and charge incidental to the transit from point to point. The sum paid included clearing the goods in the custom-house, which was done only by the railway company's servants, or if done by custom-house agents no rebate was allowed by the railway company. *Held*, that the plan of delivering goods between London and Paris at one fixed sum for the entire service, and free of any intermediate charges, was a great convenience to the public, and did not involve any infringement of the Railway and Canal Traffic Act, 1854. *Semble*, if a trader is able and engages to supply traffic with regularity and in certain quantities for the accommodation of a railway company, so that a lower rate in his case is as remunerative to the railway company as a higher rate on similar traffic in the case of others, such an arrangement is not an inequality within the Railway and Canal Traffic Act, 1854. Greenop *v.* Southeastern R. Co., 2 Nev. & Mac. 319.

Coal Traffic—Fair Interests of Company—Relative Costs of Carriage.—In determining under the 2d section of the Railway and Canal Traffic Act, 1854, whether a railway company has given an undue and unreasonable preference to a particular person, company, or traffic, or subjected a particular person, company, or traffic, to an undue or unreasonable prejudice or disadvantage, the court may take into consideration the fair interests of the railway itself, and entertain such questions as whether the company might not carry large quantities, or for longer distances, at lower rates per ton per mile, than smaller quantities, or for shorter distances, so as

EQUALITY OF CHARGE—*Continued.*

to derive equal profits to itself. But where it was manifest from the affidavits that a railway company charged Messrs. R., coal merchants at Ipswich, who sent from thence coal which had come thither by sea, a higher rate for the carriage of their coal over the company's lines than they charged Messrs. P., who had made agreements with them to carry large quantities from Peterborough over their lines, and that the sums charged to Messrs. P. were fixed, so as to enable them to compete with Messrs. R., the court granted an injunction, enjoining the company to desist from giving any undue preference to Messrs P., and to carry coals for Messrs. R. on equal terms with Messrs. P., due regard being had to the circumstances if any which rendered the cost to the company less in carrying for one party than for the other. Ransome *v.* Eastern Counties R. Co. (No. 1) 1 Nev. & Mac. 63.

Coal Traffic—Reference of Questions under Sec. 3 *of the Railway and Canal Traffic Act*, 1854.—A rule was obtained upon affidavits stating in addition to the facts alleged by the complainants in Nicholson *v.* Great Western R. Co. (No. 1) *supra*, that they verily believed that the low rates charged to the Ruabon Coal Company, taken in conjunction with the other advantages afforded to the said company by their agreement with the railway company, were not remunerative to the said railway company, or if in any degree remunerative, not nearly so much so as the higher rates charged to the complainants, and to other traders in Forest of Dean coal. This was contradicted by the defendants' affidavits. The court were equally divided as to whether the question should be referred under sec. 3 of the Railway and Canal Traffic Act, 1854. Nicholson *v.* Great Western R. Co. (No. 2), 1 Nev. & Mac. 143.

Coal Traffic—Relative Cost of Carriage—Special Agreement—Forwarding Traffic—Common Carriers.—A railway company is justified in carrying goods for one person at a less rate than that at which they carry the same description of goods for another, if there be circumstances which render the cost to the company of carrying for the former less than the cost of carrying for the latter. The Northeastern R. Co., from a desire to introduce the Northern coke into Staffordshire, were induced to make special agreements with different merchants for the carriage of coal and coke at a rate lower than their ordinary charge. *Held*, that this was not a legitimate ground for making such agreements, and that lowering their rates for that purpose, there being nothing to show that the pecuniary interests of the company were affected, was giving an undue preference to that traffic. The court refused to require the company to provide trucks for the carriage of coal and coke for a merchant who refused to pay demurrage therefor, at the same rate as was charged to all other merchants under similar circumstances, or to carry coals to the extremity of their line (where it joined the Midland Railroad), and there shift them into other trucks or wagons, they having no convenience at that place for that purpose, and not affording such facility to any other person. And as to the first branch of the rule, *held*, that the company were not common carriers of coal. Oxlade *v.* Northeastern R. Co. (No. 1) 1 Nev. & Mac. 72.

EQUALITY OF CHARGE—*Continued.*

Coal Traffic—Same Description of Goods.—A railway company carried coal to G. for shipment, from collieries situate on different branches of their line. On one branch the company charge different rates per ton per mile for the carriage of different descriptions of coal—a gas-coal rate and a common-coal rate. No such classification was made on the branch. Cannel coal (the only coal raised by the complainants) was the only coal charged at the gas-coal rate, splint coal being classed as common coal. The gas produced from splint coal is inferior in quality and quantity to that produced from an equal amount of cannel coal, but both are used in different portions for mixing with common coal in the manufacture of gas, for the purpose of increasing its illuminating power. Found, as a matter of fact, that splint coal and cannel coal had enough in common of gas-producing quality to be competitive, and to make them commercially and substantially of the same description for the purpose for which they were used, and that the cost of conveyance to the railway company of splint and cannel coal was the same; and therefore *held*, that the carriage of cannel coal and splint coal by the railway company at unequal rates per ton per mile was an undue prejudice to the complainants. *Held*, also, that if, by reason of the gradients or otherwise, the cost of conveyance of the coal to the railway company on the one branch was different from the cost on the other, a proportionate difference might be made by the railway company in the mileage rate. Nitshill & Lesmahagow Coal Co. *v.* Caledonian R. Co., 2 Nev. & Mac. 39.

Coal Traffic—Scale of Charges.—A railway company made a scale of charges for the conveyance of coal to various places on their line, commencing with a minimum charge of 9*d.* per ton for a distance not exceeding six miles. It increased up to twenty miles at the rate of 1*d.* per ton for each additional mile, and for the distance between twenty and sixty miles at the rate of about ½*d.* a mile, and above sixty miles at the rate of about ¼*d.* per mile. The reduction of rates in proportion to distance was not carried out mile by mile, apparently to avoid fractions, but between twenty and sixty miles at every two miles, and above sixty miles at every four miles, so as to maintain throughout a difference of not less than 1*d.* between two consecutive rates. The rate of the scale was lower by 8*d.* a ton than the local coal rates of the company. It did not appear that there was a greater disproportion in relation to distance in the charges than in the cost of carriage to the company or than was justified by a sea-competition, but it did appear that in some instances the scale was not equally applied. *Held*, that if the principle on which the scale was graduated was a fair consideration of the cost to the company of carrying coals for the different distances, or was justified by a sea-competition, it was not a valid objection to the scale that it was better adapted to the business of some merchants than others, and that its low rates for long distances were useless to those who dealt in the sea borne coal. The Railway and Canal Traffic Act does not prevent a railway company from having special rates of charge to a terminus to which traffic can be carried by other modes of

EQUALITY OF CHARGE—*Continued.*

carriage with which theirs is in competition. Foreman *v.* Great Eastern R. Co., 2 Nev. & Mac. 202.

Coal Traffic—Special Agreement.—A railway company were threatened by the owner of extensive collieries, which he had at considerable expense connected with their line, that unless they agreed to carry his coal to W., the terminus of their line, at a certain rate, he would construct a tramway from his collieries to W., and so divert his coal traffic from their line altogether. The company entered into an agreement with him accordingly, under which they carried his coals at such rate, being a less rate than that which they charged the proprietors of other collieries, situate in the same district for the carriage of their coals over the same portion of the line: *Held*, that this was an undue preference within the Railway and Canal Traffic Act, 1854, s. 2. Harris *v.* Cockermouth & Workington R. Co., 1 Nev. & Mac. 97.

Coal Traffic—Special Agreement—Adequate Consideration—Relative Cost of Carriage.—It is competent to a railway company to enter into special agreements whereby advantages may be secured to individuals in the carriage of goods upon the railway, where it is made clearly to appear that, in entering into such agreements, the company have only the interests of the proprietors, and the legitimate increase of the profits of the railway in view, and the consideration given to the company in return for the advantages afforded by them is adequate, and the company are willing to afford the same facilities to all others upon the same terms. Nor is the second section of the Railway and Canal Traffic Act, 1854, contravened by a railway company carrying at a lower rate, in consideration of a guaranty of large quantities, and full train-loads at regular periods, provided the real object of the company be to obtain thereby a greater remunerative profit by the diminished cost of carriage, although the effect may be to exclude from the lower rate those persons who cannot give such a guaranty. Nicholson *v.* Great Western R. Co. (No. 1), 1 Nev. & Mac. 121.

Coal Traffic—Tolls for—Agreement with Colliery Owners—Inclines.—A railway company entered into an agreement with a firm of colliery owners to carry their coal at certain rates lower than those charged to other colliery owners, with whom they had no agreement. The railway company attempted to justify the preference on the ground that the traffic not covered by the agreement was more costly to carry in consequence of a steep descending incline from the collieries to the main line. The higher rate was imposed whichever direction the coal traffic took while it passed down the incline in going in one direction only. *Held*, that a charge purporting to be in respect of a special service—such as in respect of the incline—should not have its incidence extended to traffic for which that service was not performed, and that payment in respect of such incline should under the circumstances take the form of a fixed reasonable toll payable only for the traffic using the incline. A railway company pays no more than a due regard to its own interest if it charges for its services

EQUALITY OF CHARGE—*Continued.*

in proportion to their necessary cost, and has only such a variation in its rates as there is in the circumstances of its customers affecting the cost and labor of conveyance. It is not a valid consideration for a reduced rate that the party favored is a customer also of the same railway company in goods of a quite different kind. Bellsdyke Coal Co. *v.* North British R. Co., 2 Nev. & Mac. 105.

Coal Traffic—Uniform Rate for Coal District or Coal Field.—If a railway company charge the same rates for the same traffic going to the same destination from places differing considerably in distance from that destination, this is *prima facie* evidence of an undue preference. Where there is evidence of a preference, whether or not it is an unreasonable or undue preference within the meaning of sec. 2, is a question of fact. As a general rule, charges on traffic using the same railway under the same circumstances ought to be after the same rate per ton per mile, but the rule is not so rigid that any scale that is not in conformity with it is illegal, nor are charges that are unequal, or that cause prejudice and disadvantage, prohibited by sec. 2 of the Railway and Canal Traffic Act, 1854, unless they act in that way unduly and unreasonably. A railway company charged a uniform rate for traffic from an entire district or coal field; the collieries were grouped because they all worked the same bed of coal, and the grouping applied compulsorily to a coal field extending twenty miles and covering an area in which some of the collieries were that distance apart. Collieries in one part of such district paid no higher rate than collieries in another for their coal traffic to any particular station, all alike paying one uniform rate irrespective of any difference in their actual distances from such station. Upon complaint by a colliery company in the district that the effect of the uniform rate was to subject their coal to a higher charge per ton per mile than coal from other collieries, and to deprive them of the advantage of their greater proximity to places to which the coal was sent, it was proved that the applicants were charged the same rate for conveyance of their coal to a particular station as was charged for coal sent from other collieries in the same district, although the additional distance to be run was ten or fifteen miles; *Held*, that the grouping system, as it affected the applicants, subjected them to an undue and unreasonable prejudice and disadvantage, and that the railway company ought to carry the applicants' coal at a rate per ton per mile not exceeding that charged to other coal-owners of the district, in ascertaining the mileage rate an allowance of 1*s.* per ton in all cases being first made for fixed expenses. Denaby Main Colliery Co. *v.* Manchester, Sheffield & Lincolnshire R. Co., 3 Nev. & Mac. 426.

Coal Traffic—Unloading—Cells—Terminal Charges.—The N. E. R. Co. carried coals to certain stations on their line for colliery owners only, and at such stations there were cells for the receipt and sale of the coal let to colliery owners for their separate use, at rents averaging less than 3*d.* per ton on the coal sold, and also unappropriated cells for the receipt of coal sent by colliery owners not renting cells. The latter were

EQUALITY OF CHARGE—*Continued.*

charged a higher rate of carriage than the colliery owners renting cells, and in addition a charge of 3*d.* per ton in lieu of rent. The rent and charge respectively covered all terminal services, but the services rendered the colliery owners renting cells exceeded those rendered at the unappropriated cells: *Held*, that the extra charge for carriage, and the charge of 3*d.* per ton in lieu of rent, occasioned an undue prejudice to the colliery owners not renting cells. *Semble*, that a railway company cannot make any terminal charge for merely unloading into a depot where they have no sidings for delivery. Locke *v.* Northeastern R. Co., 3 Nev. & Mac. 44.

Competition—Goods Traffic—The N. W. R. Co. carried goods by their railway for the complainants, who were brewers at B. They charged the complainants and the public generally 1*s.* per ton for the cartage of goods to and from their B. station and 9*d.* per ton for terminal services there. T. & Co. and C. & Co., who were also brewers at B., had breweries connected the M. R. Co.'s station at that place by continuous railway communication; the goods which they sent or received by the M. line were loaded and unloaded on their own premises by their servants, and they were consequently not charged by the M. R. Co. any rate for cartage or terminal services. The N. W. R. Co., in order to compete with the M. R. Co. for the carriage of the goods of T. & Co. and C. & Co., exempted them from the above-mentioned rates of 1*s.* and 9*d.* respectively, carting and loading their goods gratuitously. There being nothing to show that there was a saving of cost to the company by reason of the quantity of goods carried for T. & Co., and C. & Co. to compensate for the loss of 1*s.* 9*d.* per ton, and T. & Co. and C. & Co. being the only firms to whom the reduced rates were applicable: *Held*, that there was not a sufficient ground for the arrangements made in their favor, and that an injunction should issue against the N. W. R. Co., under the 3d section of the Railway and Canal Traffic Act, 1854. In order to justify a difference being made by a railway company in favor of one or more individual members of their general class of customers, there must be an adequate consideration to the railway company lessening the costs to them of the services rendering to such individual members of the general class, and it is not sufficient that the railway company merely desire to attract the traffic from another line to themselves, especially where the favor thus shown to a few is prejudicial to many others in the same trade as the favored persons. Thompson *v.* London & Northwestern R. Co., 2 Nev. & Mac. 115.

Loading and Unloading—Staves and Deals—Rebates.—The N. W. R. Co. had a station at B., connected by branch lines of their own with the premises of certain traders there. The company charged the same station rates between other places and any part of B. to which thier lines extended. The traders at B. hauled the trucks containing their own goods between the company's station and their premises, loading and unloading them upon the latter. The company allowed them a rebate on the station-to-

EQUALITY OF CHARGE—*Continued.*

station rates of 4½*d.* per ton in respect of haulage, and 9*d.* per ton in respect of loading and unloading deals and staves. Upon the application of a trader at B. who dealt in deals and staves, whose premises were not connected with the company's lines, and who complained that these allowances were excessive and amounted to an undue preference of the first-mentioned traders: *Held*, that this allowance of 4½*d.* could not be justified if it related simply to haulage, but was not excessive if the convenience of having the trucks loaded and unloaded off the company's lines and premises was taken into consideration, and that the allowance of 9*d.* for loading and unloading deals and staves was excessive and must be reduced to 4½*d.* Bell *v.* London & N. W. R. Co., 2 Nev. & Mac. 185.

Quarry Owners.—A railway company agreed with certain quarry owners, for a term of fourteen years, to carry slates for them over the railway at rates varrying from 3*s.* 3*d.* to 2*s.* 6*d.* per ton, according to the total quantity of slates carried by the railway company in each year, the quarry owners on their part agreeing to send their slates by no other mode of transit during that term. Subsequently a fresh agreement was entered into with one of the quarry owners for a term of thirty years, reducing the rate to 2*s.* 1½*d.* Upon an application for an injunction by quarry owners, parties to the original agreement: *Held*, that there was nothing in the consideration as to the exclusive use of the railway, being in the one case for thirty years and in the other for fourteen years, which would justify the difference between 2*s.* 6*d.* and 2*s.* 1½*d.* as charges for railway transit, and that such difference was an undue preference and prejudice within the meaning of the Railway and Canal Traffic Act, 1854. The railway company alleged that the applicants being obliged to use smaller wagons for their slates than those used by the favored quarry owner, and sending slates of a lighter description occasioned the railway company greater cost for carriage: *Held*, that 1*d.* per ton would be a reasonable allowance for such increased cost. Holland *v.* Festiniog R. Co., 2 Nev. & Mac. 278.

Railway Carrier not Entitled to Discriminate in Order to Compete with Sea Carrier.—A manufactory of the plaintiff was situated twelve miles from Swansea, and on the defendants' railway from that seaport to Liverpool. The defendants charged the plaintiff 12*s.* 6*d.* per ton for the carriage of iron and tin-plates from his manufactory to Liverpool, while other manufacturers of iron and tin-plates, whose works were situated within a radius of six miles of the seaport of Swansea, and further, therefore, from Liverpool than the plaintiffs' works, were charged by the defendants for the carriage of their plates to Liverpool 11*s.* 4*d.* per ton only. The defendants fixed the lower rate of charge for the carriage of goods within six miles of Swansea in order to compete with the sea carriage within that port and Liverpool; and by reason of the lesser charge, such manufacturers were enabled to undersell the plaintiff on delivery at Liverpool. *Held*, that this was a contravention of section 2 of the Railway and Canal Traffic Act, 1854, and that the plaintiff was entitled to maintain an action to recover the amounts paid by him to the defendants in excess of the 11*s.*

EQUALITY OF CHARGE—*Continued.*

4*d.* rate. Budd *v.* London & N. W. R. Co., 36 L. T. N. S. 802; 25 W. R. Ex. D. 752.

Reduction of Rates in Favor of Individuals.—A railway company cannot, merely for the sake of increasing their traffic, reduce their rates in favor of individual customers, unless, at all events, there is a sufficient consideration for the differential charge, and a reduction of cost in the conveyance of the traffic, or unless other equivalent services are rendered by such individuals in relation to such traffic. Evershed *v.* London & N. W. R. Co., 3 App. Cas. 1029; 48 L. J. Q. B. (H. L.) 22.

Special Agreement—Service off the Railway.—A railway company, with the object of discouraging the construction of a competing line, carried slate for certain quarry owners, who agreed to send all their slate over the railway company's line for a fixed number of years at a less rate than they charged for the same service to the complainant quarry owners who were offered, but refused to bind themselves by such an agreement: *Held,* that was an undue preference within the meaning of the Railway and Canal Traffic Act, 1854, s. 2. The railway company charged the complainant quarry owners 9*d.* per ton for the use of their wagons off the line, and demurrage if they detained them more than twenty hours, while the quarry owners who had entered into the above-mentioned agreement were charged nothing for the use of wagons off the line, and were not charged for the demurrage until after the expiration of thirty hours. *Held,* that this service off the line was incidental to the receiving, forwarding and delivering of the slate, and that the circumstances of the favor shown being in respect of something done off the line did not take the case out of the Railway and Canal Traffic Act, 1854, s. 2. The railway company charged the complainants 1*d.* per ton for shunting goods onto a siding connecting their quarry with the railway, which was the property of the complainants; while no charge was made to other quarry owners for shunting on sidings (the property of the company) connecting their quarries with the railway. The commissioners found as a fact that the service rendered to the complainants was not more onerous to the railway company than the working of the other sidings for which no charge was made and, therefore, *held,* that the extra charge was an undue under the 2d section of the said act. Diphwys Casson Slate Co. *v.* Festiniog R. Co., 2 Nev. & Mac. 73.

Undue Preference.—The plaintiff was a brewer carrying on business at B., where the defendants, a railway company, and the M. Co., another railway company, had stations. Three firms of brewers also carried on business at B., and their premises respectively were connected with the M. R. In order to prevent the the traffic of the three firms passing wholly over the M. R., and to divert some portion of it to their own line, the defendants carted goods gratuitously between their station at B. and the premises of the three firms respectively, and they also allowed certain deductions from the rates charged to the three firms for the carriage of their goods, the effect of which was that their goods were loaded and unloaded by the

EQUALITY OF CHARGE—*Continued.*

defendants gratuitously. The defendants did not cart goods gratuitously for the plaintiff between his premises and their station, and they did not allow to him deductions similar to those allowed the three firms. After carting the goods for the three firms gratuitously and allowing them the deductions before mentioned, the defendants derived a profit from the traffic, and they had not any intention to prejudice the plaintiff: *Held*, that the gratuitous carting, loading, and unloading of the goods for the three firms was an undue preference granted to them, and was in contravention of section 90 of the Railway Clauses Consolidation Act, 1845, and section 2 of the Railway and Canal Traffic Act, 1854. Evershed *v.* London & N. W. R. Co., 3 App. Cas. 1029; 48 L. J., Q. B. (H. L.) 22.

Special Charges.—The T. Co. were required by act of parliament to afford for the R. Co's. traffic, to and from P. docks, "accommodation facilities and conveniences . . . equal in all respects to the accommodation, facilities and conveniences from time to time afforded . . . for any other traffic, at the same places, "and in all respects to conduct, forward, carry on and accommodate all such traffic with equal expedition, and on equal terms with, and as well as if it were their own proper traffic;" and it was by the same act further enacted, that the extent and quality of the accommodation, facilities and conveniences to be so afforded . . . and the terms and conditions, pecuniary and otherwise, on which the same should be afforded should in case of difference be settled by arbitration. The T. Co. applied to the commissioners under the Regulation of Railways Act, 1873, s. 8, to have pecuniary terms settled for accommodation afforded the R. Co. by shunting engines at P. *Held*, that as the same service was performed for all traffic on the P. line, there was no reason why the R. Co's. traffic should be subjected to a special charge; and, moreover, that a working expense incidental to transport was not accommodation of the sort contemplated by the act to be specially paid for by the R. Co. Taff Vale R. Co. *v.* Rhymney R. Co., 2 Nev. & Mac. 176.

Through Rates—Terminal Services—Infringement of Special Act.—Upon complaint by a trader that he was subjected to an undue prejudice, within the meaning of sec. 2 of the Railway and Canal Traffic Act, 1854, because he was charged the same through rates to certain places, for traffic from his siding as was charged for traffic from a siding situated two or three miles further from them. Both sidings were situated in the same district, and had been grouped together by the railway company for through-rate purposes. *Held*, that as a through rate was a gross sum of a small amount for conveyance over a long route, it was enough if places that were practically in the same district had the same rate, and that no undue prejudice was caused to the applicant by the same rate being applicable to both the sidings. Lloyd *v.* Northampton and Banbury Junction R. Co., 3 Nev. & Mac. 259.

EXTRAORDINARY SERVICES.—See Dunkirk Colliery Co. *v.* Manchester, Sheffield & Lincolnshire R. Co. 2 Nev. & Mac. 402; Diphwys Casson Slate Co. *v.* Festiniog R. Co., 2 Ib. 73; Holland *v.* Festiniog R. Co. 2 Ib. 278.

FAIR INTERESTS OF COMPANY.—See Ransome *v.* Eastern Counties R. Co. (No. 1), 1 Nev. & Mac. 63.

FARES.—See Innes *v.* London, Brighton & S. C. R. Co. and London & S. W. R. Co. 2 Nev. & Mac. 155; East London R. Co. *v.* London, Brighton & South Coast R. Co., 2 Ib. 413; Midland R. Co. *v.* G. W. R. Co. 2 Ib. 88.

FISH TRAFFIC.—See Woodger *v.* G. E. Ry. Co., 2 Nev. & Mac. 102; Torbay & Brixham R. Co. *v.* South Devon R. Co., 2 Nev. & Mac. 391.

FORWARDING TRAFFIC—*Coal Traffic—Common Carrier.*—There is no obligation on a railway company, whether at common law or under the Railway and Canal Traffic Act, 1854, to carry goods otherwise than according to their profession. Therefore it is competent to them to restrict their coal traffic to the carriage of coals for colliery owners from the pit's mouth to stations where such colliery owners have cells or depots appropriated for the reception and sale of their coals, and to decline to carry coals from station to station, or for coal merchants, such an arrangement being essential to the regulation of the large traffic in that article, and the company not being common carriers of coal. Oxlade *v.* Northeastern R. Co., (No. 2), 1 Nev. & Mac. 162.

Coal Traffic—Facilities for Storing Coal.—A railway company having land adjoining one of their stations, let the whole of it to P., a coal merchant, for the purpose of storing coal brought by their line. P. did not require or actually use the whole of the land for this purpose. W., another coal merchant, applied to the company to provide him, on similar terms, with land for storing coal, or to let him the part of the land not actually used by P. The company refused to do so. W. then applied to the court, under the Railway and Canal Traffic Act, 1854, sec. 3 for an order compelling the company to desist from allowing P. to store coals on the land, or to give similar facilities to him. *Held* by Bovell, C. J., and Keating, J., that a means of storing coal at the station to which it is sent being a necessary facility for the proper carrying on of the coal trade, the company had no right to grant greater facilities to P. than to W., and that they ought to be restrained from doing so. *Held* by Montague Smith and Brett, J. J., that the Railway and Canal Traffic only relates to the facilities in the receiving, forwarding and delivering of traffic, and that the court had no jurisdiction to interfere with matters not relating to these, and that facilities for storing coal after it has been delivered to the consignee do not relate to the receiving, forwarding or delivering of traffic, and are not therefore under the control of the court. West *v.* London and Northwestern R. Co., 1 Nev. & Mac. 166.

FORWARDING TRAFFIC. (*See Traffic.*)—*Steamboat.*—*Held*, that sec. 2 of the Railway and Canal Traffic Act which prohibits undue preferences or advantages being given by railways and canal companies to particular persons, did not apply to the case of arrangements made by a railway company whose line terminates at the sea with a steamboat owner for carrying across the sea goods and passengers brought by the railway. Napier *v.* Glasgow and Southwestern R. Co., 1 Nev. & Mac. 292; Oxlade *v.* Northeastern R. Co. (No. 1) Ib. 72.

FORWARDING TRAFFIC—*Continued.*

Forwarding Traffic.—See Uckfield Local Board *v.* London, Brighton & S. E. R. Co., 2 Nev. & Mac. 214; Caledonian R. Co. *v.* G. N. E. & N. B. R. Cos. 2 Ib. 377.

GRADIENTS.—See Nitshill & Lesmahagow Coal Co. *v.* Caledonian R. Co. 2 Nev. & Mac. 39.

GUARANTEE OF QUANTITY.—Greenop *v.* Southeastern R. Co. 2 Nev. & Mac. 319; E. & W. Junction R. Co. *v.* G. W. R. Co., 2 Nev. & Mac. 147.

Haulage.—See Bellsdyke Coal Co. *v.* N. B. R. Co., 2 Nev. & Mac. 105.

Allowance for.—See Aberdeen Commercial Co. *v.* Great North of Scotland R. Co., 3 Nev. & Mac. 206; Howard *v.* Midland R. Co., Ib. 253; Belfast Central R. Co. *v.* Great Northern R. Co. Ib. 419.

INCLINES.—Bellsdyke Coal Co. *v.* N. B. R. Co., 2 Nev. & Mac. 105.

INSPECTION OF BOOKS.—*Rights Ancillary thereto—Persons Interested—Concurrent Remedies.*—By sec. 14 of the Regulation of Railways Act 1873, every railway company is bound to keep at each of their stations books showing every rate for the time being charged for the carriage of traffic (other than passengers and their luggage) from that station to any place to which they book, and every such rate book shall, during all reasonable hours, be open to the inspection of any person without payment of any fee, and any company failing to comply with these provisions shall, for each offence, and in case of a continuing offence, for every day during which it continues, be liable to a penalty of £5, to be recovered from two justices. *Held*, that the commissioners had jurisdiction to order an inspection, although justices also had the power to inflict a penalty for refusal to allow such inspection; that the right of inspection given by sec. 14 was general, and it was immaterial what motive or object a person had in desiring inspection; that inspection under the statute included the right of taking extracts or copies; and that at all events the court had power to order that extracts and copies might be taken as ancillary to the right of inspection, and in order to make such right effectual. Perkins *v.* London and Northwestern R. Co., 1 Nev. & Mac. 327.

Inspection of Rate Book.—See Bailey *v.* London, Chatham & Dover R. Co., 2 Nev. & Mac. 99; Harborne R. Co. *v.* London & N. W. R. Co., 2 Ib. 169; Jones *v.* N. E. R. Co., 2 Ib. 208; Robertson *v.* Midland G. W. R. Co. 2 Ib. 409.

INSPECTOR.—See Bristol & Exeter R. Co. *v.* Somerset & Dorset R. Co., 2 Nev. & Mac. 82.

JUNCTION.—See Dublin Whiskey Distillery Co. *v.* Midland Great Western of Ireland R. Co., 4 Ry. and Canal Traffic Cas., 32 Hammans *et al.* *v.* Great Western R. Co. *et al.*, Ib. 181.

JURISDICTION OF RAILWAY COMMISSIONERS—*Arbitration—Railway Companies Arbitration Act*, 1859.—The 8th section of the Regulation Act, of the Railways Act, 1873, enacts (*inter alia*) that "where any difference between railway companies is under the provisions of any general or special act required or authorized to be referred to arbitration, such difference shall at the instance of any company party to the difference, and with the

JURISDICTION OF RAILWAY COMMISSIONERS—*Continued.*

consent of the commissioners, be referred to them for their decision, in lieu of being referred to arbitration. The S. B. and L. & S. W. R. Cos. agreed to refer all differences that should arise between them respecting the purchase of the railway of the former by the latter company to arbitration in accordance with the provisions of the Railway Companies Arbitration Act, 1859. A difference afterwards arose between the companies respecting the said purchase, and the selling company thereupon applied to the commissioners to decide it. Upon objection by the purchasing company that they had no jurisdiction to entertain the application, since the difference was not required or authorized to be referred to arbitration under the provisions of any general or special act, *held*, by the commissioners, that by the company's adoption of the Act of 1859, the difference, when it arose, was authorized by the provisions of that act to be referred to arbitration within the meaning of sec. 8 of the Act of 1873, and therefore that the commissioners had jurisdiction to decide it. Stokes Bay R. & Pier Co. *v.* London & S. W. R. Co., 2 Nev. & Mac. 143.

Arbitration—Railway Companies Arbitration Act, 1859.—The Railway Companies Arbitration Act, 1859, gives power to railway companies to agree in writing to refer matters in difference, as they arise, to arbitration. *Semble*, that this act does not give the commissioners jurisdiction under the 8th section of the Regulation of Railways Act, 1873, which provides for the reference to them of difference between railway companies required or authorized to be referred to arbitration under the provisions of any general or special act, to order a reference to themselves of matters in difference between two railway companies in the absence of such an agreement. Torbay & Brixham R. Co. *v.* S. Devon R. Co., 2 Nev. & Mac. 391.

Order for Penalties.—Held, by the Queen's Bench Division, that the commissioners have power under sec. 6 of the Regulation of Railways Act, 1873, to exercise all the jurisdiction which the Court of Common Pleas had under sec. 3 of the Railway and Canal Traffic Act, 1854, and therefore have power to issue a writ of attachment, or impose a penalty not exceeding £200 for disobedience to their orders. The Queen's Bench Division has no original jurisdiction with regard to matters within the jurisdiction of the commissioners, but can only enforce orders made by the latter, under sec. 26, of the Regulation of Railways Act, 1873. Chatterly Iron Co. *v.* North Staffordshire R. Co., 3 Nev. & Mac. 238.

The railway commissioners will entertain an application in a matter within their jurisdiction, notwithstanding that a suit directed to the same end is in litigation in the ordinary courts. Portpatrick R. Co. *v.* Caledonian R. Co., 3 Nev. & Mac. 189.

Order of Penalties.—Sec. 26 of the Regulation of Railways Act, 1873, gives the commissioners the same power to enforce a decision made under sec. 8, as to enforce any writs or orders made under sec. 6. Portpatrick R. C. *v.* Caledonian R. Co., 3 Nev. & Mac. 189.

Orders for Structural Works.—See Southeastern R. Co. *v.* Railway Commissioners and Corporation of Hastings, 3 Nev. & Mac. 464.

JURISDICTION OF RAILWAY COMMISSIONERS—*Continued.*

Passenger Traffic—Train Accommodation.—As to railway commissioners' jurisdiction to require railway companies to afford accommodation to the public in the matter of trains, stations, and through booking. Innes *v.* London, Brighton and London & S. W. R. Cos., 2 Nev. & Mac. 155; East London R. Co. *v.* London, Brighton & South Coast R. Co., 2 Ib. 413.

Railway Companies—Discretion as to the Issuing of an Order.—The commissioners, in their discretion, will refuse to give an imperfect relief to applicants when there is an immediate prospect of statutory powers which will give a better relief than the order the commissioners have jurisdiction to issue. Swindon & M. R. Co. *v.* Great Western R. Co., 4 Ry. & Canal Traffic Cas. 173.

Special Acts—Construction of.—The railway commissioners have no power to deal with any thing done by railway companies contrary to the provisions of their special acts, unless it also contravenes the provisions of the general acts which the commissioners have to carry out. 2 Nev. & Mac. 43, note 214.

Joint Action by Railways.—The commissioners have no power to make an order on two railway companies to act jointly in doing what neither company has power to do separately. Toomer *v.* Chatham and Dover and Southeastern R. Cos., 3 Nev. & Mac. 79.

Through Rates.—A canal company had a dividend on their capital guaranteed to them by a railway company under a special act, which provided that they should not reduce or vary the rates for the time being payable on the canal without the consent of the railway company. *Held*, by the Exchequer Division, that the commissioners had no power without the consent of the railway company, and without the railway company being before them, to make an order under sec. 11 of the Act of 1873, establishing a through rate over that and other canals, and reducing the rates payable on that canal and others. Warwick & Birmingham Canal Co. *v.* Birmingham Canal Co. and London & Northwestern R. Co., 3 Nev. & Mac. 324.

The jurisdiction of the commissioners, under sec. 11 of the Regulation of Railways Act, 1873, is simply to decide whether the proposed through rates shall be allowed. Newry, etc., R. Co. *v.* Great Northern (of Ireland) R. Co., Ib. 28.

Undue Preference to Towns.—The railway commissioners have jurisdiction to inquire into a complaint of undue preference being shown by railway companies to one town or place over another town or place. Corporation of Dover *v.* Southeastern & London, Chatham & Dover R. Cos., 1 Nev. & Mac. 349.

Working Agreement—Approval of—Reversion.—The railway commissioners have no jurisdiction to reverse an agreement which has been approved by parliament, and which the board of trade has no power to approve of. *Semble*, that the power given to the railway commissioners under sec. 10 of the Regulation of Railways Act, 1873, to approve of

JURISDICTION OF RAILWAY COMMISSIONERS—*Continued.*

working agreements, covers and includes the power to revise such agreements.

LEASE—*Construction of—Works for Accommodation of Traffic—Works to Increase Safety of Railway.*—The S. W. R. Co. were the lessees of the S. railway under a lease, whereby it was required that the lessors should execute all such additional works, if any, in and in connection with the thereby demised railways, and for landowners and others, as may from time to time be required in pursuance of the acts from time to time in force with respect to the management, working, use and maintenance of the railways, and the works thereof and the traffic thereon; nevertheless, that the lessees should maintain and repair such works when executed: *Held*, that this provision extended to works necessary to afford due facilities for traffic under the Railway and Canal Traffic Act, 1854, including therein works which it is made indirectly incumbent on a railway company to provide, if it would avoid contingencies for which it would incur a liability, such as new signals provided for putting the block system in operation. Southwestern R. Co. *v.* Staines, etc., R. Co., 3 Nev. & Mac. 48.

LICENSE—*Exaction of License Fee from Foreign Corporations not a Regulation of Interstate Commerce.*—The Pennsylvania Act of June 7, 1879, requiring foreign corporations exercising the privilege of having an office in Pennsylvania to pay a license fee therefor, is applicable to the Norfolk & Western R. Co. Such a license fee is not a tax upon the business or property of that corporation, nor a regulation of interstate commerce within the purview of the commercial clause of the Federal Constitution. Norfolk & Western R. Co. *v.* Commonwealth (Penn. Oct., 1886) 26 Am. & Eng. R. R. Cas. 48.

Loading and Unloading.—See Thompson *v.* London & N. W. R. Co., 2 Nev. & Mac. 115; Bell *v.* London & N. W. R. Co., 2 Ib. 185.

MAILS—*Conveyance of—Jurisdiction.*—By sec. 18 of the Regulation of Railways Act, 1873, it is enacted that every railway company shall convey by any train all such mails as may be tendered for conveyance, whether under the charge of a guard appointed by the postmaster-general or not, and notwithstanding that notice in writing requiring mails to be conveyed has been given to the company. By sec. 19 reasonable remuneration is to be paid for such services; and by the second clause of this section "any difference between the postmaster-general and any railway company as to the amount of such remuneration or as to any other question arising under this act, shall be decided by arbitration in manner provided by Stat. 1 & 2 Vic., c. 98, or at the option of such railway company by the commissioners." Upon an application by the postmaster-general to the commissioners for an injunction against the Highland R. Co. to compel them to carry the mails pursuant to the 18th section, it was objected by the company that the commissioners had no jurisdiction, as the complaint came within the said arbitration clause, and should be determined according to the Stat. 1 & 2 Vict. c. 98; but *held*, that this was not a "difference" within the meaning of the 19th section, and that the words therein "any

MAILS—*Continued.*

other question" should be confined by the preceding particular words to questions of remuneration, compensation, and the like. Postmaster-General *v.* Highland R. Co., 2 Nev. & Mac. 34.

MANDAMUS TO RAILWAY COMMISSIONERS.—See Denaby Main Colliery Co. *v.* Manchester, etc., R. Co., 3 Nev. & Mac. 438.

MANURE TRAFFIC.—See Aberdeen Lime Co. *v.* Great North of Scotland Rail Co., 3 Nev. & Mac. 205.

MILEAGE PROPORTION.—See Nitshill & Lesmahagow Coal Co., *v.* Caledonian R. Co., 2 Nev. & Mac. 39; Foreman *v.* Great Eastern R. Co., 2 Ib. 202.

MINERAL RATES.—See Harborne R. Co. *v.* London & N. W. R. Co., 2 Nev. & Mac. 169; Jones *v.* N. E. R. Co., 2 Ib. 208.

MINERAL TRAFFIC.—See Chatterly Iron Co. *v.* North Staffordshire Rail Co., 3 Nev. & Mac. 238.

NATURAL ADVANTAGES OF POSITION.—See Ransome *v.* Eastern Counties R. Co. (No. 2), 1 Nev. & Mac. 109.

NEW LINES.—See Midland R. Co. *v.* G. W. R. Co., 2 Nev. & Mac. 298.

OBJECTION TO WORKING AGREEMENT.—See Sirhowy R. Co. with London & N. W. R. Co., 2 Nev. & Mac. 264.

OMNIBUS.—See Marriott *v.* London and Southwestern R. Co., 1 Nev. & Mac. 47.

ONUS PROBANDI.—See Watkinson *v.* Wrexam Mold & Connah's Quay Rail Co., 3 Nev. & Mac. 164; Denaby Main Colliery Co. *v.* Manchester, etc., R. Co., Ib. 426; Midland R. Co. *v.* G. W. R. Co., 2 Nev. Mac. 298.

ORDINARY TRAINS.—A railway company cannot by giving names to the trains excluding them in terms from being ordinary trains, prevent them from being ordinary trains if they are so in fact. Where a branch railway act gave a landowner the right to stop by signal all ordinary trains. *Held*, that accelerating trains forming part of fast through trains from London were not "ordinary" trains, though the fares charged were at the ordinary rate. Turner *v.* London and Southwestern R. Co. L. R., 17 Eq. 561; 43 L. J., ch. 430.

OWNERS' WAGONS.—See Newry and Armagh Rail Co. *v.* Great Northern (of Ireland) Rail Co., 3 Nev. and Mac. 28; Watkinson *v.* Wrexham, etc., R. Co. Ib. 5; Same *v.* Same, Ib. 446.

PACKED PARCELS.—A railway company incorporated for the conveyance of passengers and goods from London to Folkestone under the acts of parliament which prohibit them from making unequal charges, obtained another act enabling them to establish a communication by steam vessels with Boulogne, which last-mentioned act contained no proviso as to the equality of rates for the carriage of goods. The company by their tariff charged certain rates for small parcels, with a double charge for "packed parcels." *Held*, that so far as regarded the contract for the carriage of such parcels from Boulogne to London, there was nothing illegal in the increased charge. Branley *v.* Southeastern R. Co., 12 C. B., N. S. 63: 31 L. J. C. P. 286.

PACKED PARCELS—*Continued.*

The plaintiff, a carrier was in the habit of collecting small parcels and sending them together in large packages by the defendants' railway. The defendants charged different rates of carriage for different classes of goods, the highest charges being for packed parcels. A declaration was required from the plaintiff as to the description of his parcels. He declared them as "packed parcels," and was charged and paid accordingly. Finding, however, that other firms sent packed parcels, from whom no declaration was required, and who were charged for them at a less rate, he sued the company to recover the alleged excess as for money had and received. On the trial he gave evidence that the practice of the other firms in sending "packed parcels" was notorious. *Held*, by the House of Lords, affirming the judgment of the Exchequer Chamber, that the evidence produced was admissible, and was sufficient to show that the defendants knew of the practice of other firms to pack their parcels, and that, with such knowledge, they had improperly charged the plaintiff with a higher rate of charge, and had thus infringed the equality clause, and that the plaintiff was entitled to recover the amount so charged in excess as for money had and received. Great Western R. Co. *v.* Sutton, 38 L. J. Exch. 177 (H. of L.), L. R., 4 H. L. 226, in which all the preceding cases on this subject are collected and commented upon.

The plaintiffs were common carriers trading under the name of "Pickford & Co.," and they were in the habit of collecting parcels in London and forwarding them to customers in the country. Each parcel was addressed to the person to whom it was ultimately to be delivered, but it was labelled with the name of "Pickford & Co." and that of the station to which it was to be sent, and all the parcels for the station were delivered in one consignment, consigned to the plaintiffs at that station, The defendants refused to charge the plaintiffs for the carriage of their parcels at a tonnage rate upon the gross weight, and charged for each parcel separately, according to its individual weight. *Held*, that this created an inequality. Baxendale *v.* The Southwestern R. Co., 35 L. J. Exch. 108.

PARCELS.—This provision does not repeal the equality clauses, but only the clause limiting to maximum of tolls. Baxendale *v.* Great Western R. Co., 16 C. B., N. S. 137, 140.

PASSENGER FARES.—See Midland R. Co. *v.* G. W. R. Co., 2 Nev. & Mac. 88.

PASSENGER TICKET.—See City of Dublin Steam Packet Co. *v.* London & N. W. R. Co., 4 R. & Canal Traffic Cas. 10.

PASSENGER TRAFFIC.—See Southeastern R. Co. *v.* Railway Commissioners *et al.*, 3 Nev. & Mac. 464; Local Board for District of Newington *v.* Northeastern R. Co., Ib. 48; James and others *v.* Tiff Vale and Great Western R. Cos., Ib. 540; Caledonian *v.* North British R. Co., Ib. 56.

A passenger desiring to use an ordinary train for part of a journey, for which he has taken a through ticket, entitling him to travel by express, is not entitled to any deduction from the through fare on account of any

PASSENGER TRAFFIC—*Continued.*

difference of the service. Upon complaint by the D. Steam Packet Co. that the N. W. R. Co. had not complied with sec. 16, of the Regulation of Railways Act, 1868, which enacts (*inter alia*) "where an aggregate sum is charged by the company for conveyance of a passenger by a steam vessel and on the railway, the ticket shall have the amount of toll charged for conveyance by the steam vessel distinguished from the amount charged for conveyance on the railway," it was admitted by the N. W. R. Co. to be so, but as the D. Steam Packet Co. did not show that such non-compliance had caused any damage to themselves, the commissioners made no order. City of Dublin Steam Packet Co. *v.* London & N. W. R. Co. 4 R. & Canal Traffic Cas. 10.

By their original act a railway company had a scale of authorized charges for passengers according to distance. By a subsequent act the company were empowered to make a short extension line, and charge a lump sum for passengers over that extension. A still later act allowed the company to amalgamate with another existing company, on condition of their reducing their charges to the same scale as that of the other company. That scale was 1*d.* a mile for each third-class passenger. The plaintiff travelled over the companies' line, including the short extension, and was charged a sum which was at the rate of more than 1*d.* per mile over the distance, exclusive of the extension, assuming that the company added five per cent. for government duty. On action brought to recover the excess above 1*d.* per mile over the whole distance, *held*, that the effect of the latter act was to restrict the charge of the company as carriers to the same charges over the whole line as the amalgamated company were entitled to recover: *held*, further, that the company were entitled to add the government duty. Brown *v.* Great Western R. Co. 9 Q. B. D. (C. A.) 744; 51 L. J., Q. B. D. (App.) 529.

By the act authorizing the construction of a railway, the company was empowered to demand certain tolls for the carriage of passengers and goods, and upon payment of the tolls demandable, all persons should be entitled to use the railway. The company were required to set up mile posts along the whole line at the distance of one quarter of a mile from each other, and it was enacted that "no tolls should be demanded or taken by the company during any time at which the mile-posts should not be set up and maintained." The plaintiff having travelled in one of the company's trains along their line at a time when two of the mile-posts had been removed, sued to recover the fare which he had been compelled to pay for his journey, on the ground that it was not, by reason of the above-mentioned enactment, demandable. *Held*, that he could not recover, because the provisions as to mile-posts applied to "tolls," strictly so called, and did not extend to charges for carrying passengers in the company's own carriages. Brown *v.* Great Western R. Co., 9 Q. B. D., C. A. 744.

Discrimination between those Buying Tickets and those Paying Fare on the Train.—A railroad company has power to make reasonable regula-

PASSENGER TRAFFIC—*Continued.*

tions as to the payment of fares by passengers upon its road, and in the exercise of such power may make a discrimination between fares paid by passengers in the cars, and those paid at the ticket office by purchasing tickets; and it is immaterial whether the mode of this discrimination is by selling tickets at a stated discount from the regular fare, or by charging a sum beyond the regular fare if tickets are not procured; but in order to justify the expulsion of a passenger from the train for refusing to pay the difference between the ticket fare and the regular car fare when a ticket is not procured, the company must afford passengers a reasonable and proper opportunity to avail themselves of the advantage, and avoid the disadvantage of this discrimination. Du Lawrans *v.* St. Paul, etc., R. Co., 15 Minn. 49. See also St. Louis, etc. R. Co. *v.* Dalby, 19 Ill. 353; St. Louis, etc., R. Co. *v.* South, 43 Ill. 177; Stephen *v.* Smith, 29 Vt. 163, holding that passengers may be expelled only at a usual stopping place; Porter *v.* N. Y., etc., R. Co., 34 Barb. 353, holding it to be duty of company to keep ticket office open until actual departure of train. Bordeaux *v.* Erie R. Co. (*Held*, that the company is not bound to keep its ticket offices open at or for any particular time, and the fact that a passenger was unable to procure a ticket because of office being shut will not exempt him from extra charge by conductor.) State *v.* Chovin, 7 Iowa, 204; Indianapolis, etc. R. Co. *v.* Rinard, 46 Ind. 293; Jeffersonville R. Co. *v.* Rogers, 28 Ind. 1. *Held*, that passenger may be expelled between stations for refusing to pay extra amount exacted by conductor; State *v.* Goold, 53 Me. 279, holding that conductor is justified in compelling passenger who refuses to pay the extra charge to those not having tickets to leave train only at regular station. Crocker *v.* New London, etc., R. Co., 24 Conn. 251; Hilliard *v.* Goold, 34 N. H. 230.

Train Accommodation—Due and Reasonable Facilities—Station Accommodation—Through Booking—Traffic Arrangements—Fares.—Upon complaint by residents of the district occupied by the T. line of railway of the manner in which it was worked by the S. W. and the L. & B. R. Cos., who were joint owners of it, it was alleged that the through fares between the district and London were too high compared with other fares; that the trains were few and inconveniently timed; that trains to Victoria Station had been entirely taken off; that no through booking was allowed between the joint railway and London, and that the station on the joint line was about 130 yards from any carriage road and approached only by an unsheltered foot-path of that length. As to the fares: *Held*, to justify interference by the commissioners it was not sufficient merely that a distinction in the fares of different lines, even of the same company, existed unless it created an undue preference or prejudice, and such did not appear upon the evidence in this case. As to the trains: *Held*, that the commissioners had jurisdiction to compel railway companies being carriers to conform to every portion of the 2d section of the Railway and Canal Traffic Act, 1854, and so to conduct their business as to give to the public all reasonable facilities; that upon evidence the trains were sufficient in

PASSENGER TRAFFIC—*Continued.*

number and properly timed, except as to Victoria station, and it was left to the L. & B. Co. to devise the method of affording proper accommodations in this respect, the commissioners pointing out that upon the evidence it could be done without running additional trains and merely by providing a transfer station. Through booking was ordered from the joint line by both the railways where they performed a continuous communication with London. It is not necessary to establish a claim to thorough booking that the service should be continuous by the same trains, or by a connection between trains. It was held that the station did not afford sufficient accommodation to the public; and as to this and the train accommodation to Victoria Station, the order was suspended for a month, so that the railway companies might make satisfactory arrangements. It appearing in the course of the case that a local or short distance charge was made on the joint line by S. W. R. Co.: *Held*, on the construction of the special act, that such charge should not be made, and that this section of the joint line, being by such special act, part of the main line of the S. W. Co,. the mileage rate for the joint portion of the through route ought not to be higher then that on the main line. Innes *v.* London, Brighton & London and London & S. W. R. Cos., 2 Nev. & Mac. 155.

Working Agreement—Development of Traffic—Through Trains—Correspondence of Trains—Through Fares.—The B. R. Co., under an agreement, worked the line of the E. L. R. Co., which extended from Liverpool Street (city terminus) to New Cross and Old Kent Road, where it joined their lines. The agreement provided that the B. Co. should so work the E. L. Railway "as fairly and efficiently to develop the traffic." Upon the complaint by the E. L. Co. that the B. Co.'s mode of working the railway was not favorable to the through passenger traffic between Liverpool Street and places on the B. Co.'s lines, because (1) The times of the B. Co.'s trains at the junctions fitted so badly to the times of the trains on the E. L. line, and the interval between the arrival at either of the junctions of a train one the one line and the next departure of a train on the other was so considerable that through journeys could not be accomplished in any reasonable time. (2) The trains running on the E. L. line were not allowed to use the up and down junctions with the B. Co.'s line at New Cross, but were run on a short branch line into a separate low level station there. (3) Through fares to London Bridge, a terminus of the B. Co. and Liverpool Street were different, and considerabbly lower to London Bridge. *Held*, that what can be required of railway companies to work a line efficiently must vary according to their respective powers, and that a mode of working which would be efficient in one case would not be so in another; that, in the absence of any provisions in the agreement as to the running of through trains, the expression the "traffic" under the circumstances must be taken to apply both to through and local traffic; that the B. R. Co. might withhold through trains, if through traffic could be sufficiently encouraged by having a good correspondence between trains: that, the

PASSENGER TRAFFIC—*Continued.*

fares *via* London Bridge and the fares *via* Liverpool Street ought to be at the same mileage rate, as competitive traffic could not under the burden of higher fares be fairly developed in the terms of the agreement. *Semble*, if the agreement would be rendered inoperative unless through trains were run, there would be the same obligation to run them as if they had been expressly mentioned. East London R. Co. *v.* London, Brighton & S. Coast R. Co., 2 Nev. & Mac. 413; Midland R. Co. *v.* G. W. R. Co., 2 Ib. 88; Baca & Dolgelly R. Co. *v.* Chambrian R. Co., 2 Ib. 47; Caledonian R. Co. *v.* N. British R. Co., 2 Ib. 271; Greenock & Wemyss Bay R. Co. *v.* Caledonian R. Co., 2 Ib. 227.

PENALTIES FOR DISOBEYING ORDERS OF COMMISSIONERS.—See Chatterly Iron Co. *v.* North Staffordshire R. Co., 3 Nev. & Mac. 238.

PENALTY—*Recovery of, on Account of Overcharge.*—Where the plaintiff entered the cars of the New York Central R. Co. at Utica, as a passenger, at one o'clock, A.M., without first having procured a ticket, the ticket office not being then open, nor for an hour previous to the departure of the train, it was *held*, that the company, having assumed to demand and receive from the plaintiff five cents in addition to the legal fare, under these circumstances it "asked and received a greater rate of fare than that allowed by law," and was thus brought within the provisions of the 1st section of chapter 185 of the laws of 1857, and was liable to the penalty of $50 mentioned in that section. *Held*, also, that in an action against the railway company, to recover the forfeiture of $50, it was not necessary that the complaint should set out the various enactments consolidating the several companies which make up the New York Central R. Co., so as to show that the latter company is restricted to a fare of two cents per mile for each passenger; but that it was enough to allege that the defendant had been duly organized; that it was entitled to demand and receive of passengers a certain rate of fare, and that it had demanded and received a higher rate. Nellis *v.* New York, etc., R. Co., 30 N. Y. 505.

Recovery of Penalty for Excessive Charge.—Where the petition shows that the plaintiff was charged $100 in excess of the rate fixed by the bill of lading, but does not state that the rate charged was in excess of that fixed by law, no case is stated to entitle plaintiff to recover a penalty under the Texas statute. Dwyer *v.* Gulf, Colorado & S. F. R. Co., 23 Am. & Eng. R. R. Cas. 654.

What Necessary to Show in order to Recover Penalty for Discrimination.—To entitle one to recover under chapter 68, laws of the Fifteenth General Assembly of Iowa, for discrimination in rates for the carriage of goods, it must appear that the discrimination was made for a like service and under "like conditions" in all material respects, and the burden of proof is upon the plaintiff claiming damages under such chapter for such discriminations to show that the conditions of the shipment were like. Paxton *v.* Illinois, etc., R. Co., 9 N. W. Reptr. 334, 6 Am. & Eng. R. R. Cas. 591.

PENALTY—*Continued.*

PLATFORMS.—See Southeastern Rail Co. *v.* Railway Commissioners and Corporation of Hastings, 3 Nev. & Mac. 464.

PREFERENCE OF ONE TOWN OVER ANOTHER.—*Passenger Traffic—Equality of Charge—Stoppage of Trains—Third-Class Return Tickets—Covered Stations—Construction of Statute.*—It is not a sufficient ground for complaint under the Railway and Canal Traffic Act, 1854, section 2, that a railway charge higher fares for distance on one of their branch lines than they charge for equal distances on another, nor that they issue third-class return tickets on one branch line and not on another. Nor will the court interfere with the arrangements of a railway company respecting the number of trains that stop, or the times at which they stop, at any particular station, unless it be distinctly shown that such arrangements do not sufficiently provide for the accommodation of the public. A railway company issued third-class return tickets to stations a certain distance only down their line; the court refused to enjoin them to issue such tickets to stations beyond that distance. *Semble*, a covered station is reasonable accommodation, which a railway company is bound to provide for the public. Per Crowder, J.—It appears that undue preference and undue prejudice refer to persons and companies using the line between the same termini. Caterham R. Co. *v.* Brighton & Southeastern R. Co., 1 Nev. & Mac. 32.

Passenger Traffic—Season Tickets.—The court refused to grant a rule for an injunction against the Eastern Counties R. Co. under the Railway and Canal Traffic Act, 1854, to compel them to issue season tickets between Colchester and London on the same terms as they issued them between Harwich and London, upon the mere suggestion that the granting the latter (the distance being considerably greater) at a much lower rate than the former, was an undue and unreasonable preference of the inhabitants of Harwich over those of Colchester. Jones *v.* Eastern Counties R. Co., 1 Nev. & Mac. 45.

PREFERENCE OF TERMINAL TO INTERMEDIATE TRAFFIC—*Passenger Traffic—Title to Complain.*—A railway company having fixed the rates for passengers travelling between the termini of the line according to a much lower scale than the rates exigible from passengers travelling between intermediate stations: *Held*, that no one has a title to complain of such proportional rating, unless there be a competition of interest, or unless the complainer set forth personal disadvantage to himself—the mere statement that the complainer has frequent occasion to travel upon the railway not being sufficient. *Question*, whether the provisions of the Act of 1854 apply to the regulating of passenger fares. Hozier *v.* Caledonian R. Co., 1 Nev. & Mac. 27.

PREFERENCE, SHAREHOLDERS.—See Caledonian R. Co. *v.* Greenock & Wemyss Bay R. Co., 2 Nev. & Mac. 122.

PROHIBITION.—See Halesowen R. Co. *v.* Great Western R. Co., 4 Railway and Canal Traffic Cas. 224.

PROHIBITION TO RAILWAY COMMISSIONERS.—If the railway commissioners act beyond their power, prohibition will lie, notwithstanding the Court of Common Pleas, over railways under 17 and 18 Vict. c. 31, was transferred to such commissioners by 36 and 37 Vict. c. 48. Southeastern R. Co. *v.* R. Commissioners, 3 Nev. & Mac. 464.

If the commissioners erroneously came to the conclusion that there was evidence before them of a breach of sec. 2 of the Railway and Canal Traffic Act, 1854, this is an error in law in respect of a matter within their jurisdiction, and therefore not matter for prohibition, but for appeal. Denaby Main Colliery Co. *v.* Manchester, etc., R. Co., 3 Nev. & Mac. 426.

PUBLIC BENEFIT.—See Palmer *v.* London, Brighton & South Coast R. Co., 1 Nev. & Mac. 271.

PUBLIC INCONVENIENCE.—See Beadell *v.* Eastern Counties R. Co., 1 Nev. & Mac. 56; Painter *v.* London, Brighton & South Coast R. Co., Ib. 58; Ilfracombe Public Conveyance Co. *v.* London & Southwestern R. Co., Ib. 61.

PUBLIC SERVICE.—See In the matter of the application of the inhabitants of Launceston, 3 Nev. & Mac. 137.

PULLMAN CAR.—See Caledonian *v.* North British R. Co., 3 Nev. & Mac. 56.

RAILWAY AND CANAL TRAFFIC ACT, 1854, s. 2.—*Construction of.*—See Caterham R. Co. *v.* Brighton & Southeastern R. Cos., 1 Nev. & Mac. 32.

RAILWAY COMMISSIONERS.—*Act Establishing, in Tennessee, held Invalid.* —The act of the general assembly of Tennessee of March 30, 1883, to establish a railroad commission analyzed, and *held* to be invalid because its provisions are too indefinite, vague, and uncertain to sustain a suit for the penalties imposed, and do not sufficiently define the offences therein declared. It leaves to the jury to say whether, upon the proof, the difference in rates amounted to a discrimination, or whether the charges were unjust and unreasonable, thus making the guilt or innocence of the accused depend upon the finding of a jury, and not upon the construction of the act. It regulates the administration of the law to the unrestrained discretion of the jury, and there could be, therefore, no reasonable approximation to uniform results; but verdicts would be as variant as their prejudices, and inevitably lead to inequalities and injustice. Neither is the objection to the act for uncertainty removed by its attempt to prescribe a standard of compensation for the guidance of the jury. It does not with precision point out the assessment for taxation which is to furnish the basis of judgment, nor prescribe the rule under which the net earnings are to to be computed. But if these difficulties were overcome, there remains no method of measuring what is a "fair and just return" on the value of the property of the companies which they are allowed to earn before becoming liable to the penalties of the statute; but the act leaves it to the unqualified discretion of the jury, whose verdicts may vary not only as between different companies, but as between different suits as to the same company. One jury may fix it at one rate per cent, and others at different rates, so that no company could tell

RAILWAY COMMISSIONERS—*Continued.*

whether it was violating the law or not, and the fact would be determined by the fluctuating contingencies of business, and a charge made on the calculation that six per cent would be fair, might, by the verdict of a jury, upon facts transpiring subsequent to the alleged violation, be pronounced unreasonable and unjust. The legislature cannot delegate such power to a jury without a practical confiscation of the citizen's property. The act also held invalid as amounting to a regulation of interstate commerce. Louisville & N. R. Co. *v.* Railroad Commissioners of Tenn. (U. S. C. C. M. D. Tenn., Feb., 1884), 16 Am. & Eng. R. R. Cas. 1.

Constitutionality of.—The law of Mississippi appointing a Railroad Commission is not unconstitutional. Said commission has no power to oblige railroad companies to charge no higher rates of freight than they are allowed by their charter to charge, even though such companies may be engaged in interstate commerce. Railroad Commission of Mississippi *v.* Yazoo & Miss. Valley R. Co., 21 Am. & Eng. R. R. Cas. 6.

RATES — *Authorized Tolls — Power to Exceed—Construction of Toll Clauses.—Held*, by the commissioners, that a railway company, if it makes illegal or excessive charges for the conveyance of traffic, does not afford all reasonable facilities within the meaning of sec. 2 of the Railway and Canal Traffic Act, 1854. *Held*, by the Court of Session, that a railway company, if it makes illegal or excessive charges for the conveyance of traffic, subjects such traffic to undue prejudice within the meaning of sec. 2 of the Railway and Canal Traffic Act, 1854. Whether a railway company carry as common carriers or in any other capacity, they are equally bound not to exceed, except as expressly empowered, the authorized scale of tolls. The special act of a railway company enacted that (sec. 52) "they may demand any tolls for the use of their railway not exceeding the following: In respect of the tonnage of all articles conveyed upon the railway, or any part thereof, as follows: For all dung, composts, and all sorts of manures, per ton per mile, 2*d.*, and if conveyed by carriages belonging to the company, an additional sum per ton per mile of 1*d.*," that (sec. 53) "the toll which the company may demand for the use of engines for propelling carriages shall not exceed 1*d.* per ton for each passenger or animal or for each ton of goods or other articles;" that (sec. 55) "it shall not be lawful for the company to charge in respect of the several articles and things hereinafter mentioned, conveyed on the railway or any part thereof, any greater sum, including the charges for the use of carriages, wagons or trucks, and for locomotive power, and all other charges incidental to such conveyance, than the several sums hereinafter mentioned, that is to say for dung, compost, and all sorts of manure, 2*d.* per ton per mile." The company gave notice that they would not act as carriers of manure and other specified articles, but would at the request of parties and at agreed rates, provide wagons or locomotive power, or both, to persons desiring the use of their railway to forward the above-mentioned articles, and claimed to charge under the toll clauses for such articles carried on their railway: *Held*, by the commissioners, affirmed by the Court of Session in

RATES—*Continued.*

Scotland, that notwithstanding such notice, the company in fact acted as carriers of such articles, and were not entitled to charge under the toll clauses; and *held*, by the Commissioners, that sec. 55 limited tolls as well as rates for manure to 2*d.* per ton per mile. The expression, "all sorts of manure" in a toll clause includes all sorts both of natural and artificial manures *bona fide* forwarded for the purpose of being used as fertilizers. Aberdeen Lime Co. *v.* Great North of Scotland R. Co., 3 Nev. & Mac. 205. Although a railway company give public notice that they are not common carriers of mineral traffic, and that they only undertake to convey such traffic under special rates and provisions, such special rates must not exceed the maximum authorized to be charged for mineral traffic by their act. In construction of special act, toll clauses held to be controlled by a general clause limiting maximum charges. Chatterly Iron Co. *v.* North Staffordshire R. Co., 3 Nev. & Mac. 238.

Conditions of Carriage—Knowledge of Customer.—A common carrier like other insurers, may demand a premium proportioned to the hazards of his employment; he may therefore require the owner of goods to give such information as will enable him to decide on the proper amount of compensation for his services and risk, and the degree of care necessary to the discharge of the trust; and if the owner give an answer false in a material point, the carrier will be absolved from the consequences of a loss not occasioned by negligence or misconduct; but in such case actual notice of the requirements of the carrier must be brought home to the knowledge of the owners of the goods. A general notice posted up in a stage-coach office and other places is not sufficient to subject the owner to the charge of fraud. It seems that the only safe course for the carrier is to announce his terms to every individual who applies at his office, and at the same time place in his hands a printed paper specifying such terms. In respect to the question of actual and implied notice, it was held in this case that evidence that a notice that baggage sent or carried in the telegraph line would be at the risk of the owner, printed on a large sheet placarded in most of stage offices from Albany to Buffalo (the route of the coach) and particularly at Utica, where the plaintiff had resided for three years immediately preceding the loss of the trunk, the occasion of the action was not sufficient to authorize a jury to infer knowledge on the part of the plaintiff of the terms on which the coach proprietor intended to transact his business. Hollister *v.* Nowlen, 19 Wend. 234.

Connecting Roads—Rates Given to Proprietors of—Evidence of Increased Charge Without Notice.—A provision in the charter of a railroad corporation that proprietors of certain wharves and lands should have the right to construct upon such lands railroads connecting with the main road, and of entering upon that road with their cars and vehicles, "and that the owners and conductors of said cars and vehicles shall be liable to pay the same and no other rates of toll, and be subject to the same rules, regulations and provisions as the owners and conductors of other cars and vehicles travelling upon said main road," does not, since the passing of the

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St. of 1845, c. 191, regulating and limiting the rights of connecting roads to use a railroad, give the proprietors of those wharves and lands the right to have goods transported in the cars of the corporation owning the railroad at the same rates and no higher than those charged to others for the same and similar kinds of goods. A railroad corporation is not obliged as a common carrier to transport goods and merchandise for all persons at the same rates. In an action to recover for transporting merchandise over a railroad, in the absence of a special contract, evidence is admissible that the plaintiffs raised their charges without giving notice thereof to the defendant, and without his knowing that they were different from what he had been accustomed to pay. Fitchburg R. Co. *v.* Gage *et al.*, 12 Gray, 393.

Extortionate—Acquiescence.—Where a common carrier fixes a rate for freight that is excessive, and a shipper pays such rate for many years without objection, he is deemed to have acquiesced in such rate as reasonable, and cannot maintain an action to recover the excess as unreasonable. Killmer *v.* New York Central & H. R. Co. (New York,, Nov. 1885), 23 Am. & Eng. R. R. Cas. 659.

Exorbitant—Recovery of Penalty.—In an action against a railroad company under Revised Statutes, chapter 21, article 3, for illegal charges of freight on saw-logs, a petition is sufficient which alleges that plaintiff shipped two carloads of saw-logs over defendant's road a distance of over twenty-five miles and under fifty; that the legal rates were a certain specified sum; that defendant charged and plaintiff paid a different specified sum, being an excess of $3.20 over the legal rates allowed defendant, and asking judgment for the latter sum. Saw-logs belong to Class J of Revised Statutes, section 834, regulating freight charges of railroads. The provision of Revised Statutes, section 835, giving the injured party a right of action against a railroad for three times the excess of the legal rate of freight charged by it is constitutional. Burkholder *v.* Union Trust Co. (82 Missouri, 572), 23 Am. & Eng. R. R. Cas. 656.

Freight Rates—Overcharges—Recovery.—If a person is engaged in buying oil in an oil region and shipping it over a railroad, and there is no other outlet for this oil except over this railroad, and under these circumstances he agrees to pay to the railroad company more than its legal rates of charge for the freight of such oil, and does make such payment from time to time in order that he may get his oil transported to market in the only manner which he can transport it, though such payments are made after each shipment of oil has been made and the oil delivered, such person must be considered as making such payment not voluntarily but by compulsion, and he has a right, in an action for money had and received for his use, to recover back the excess of freight so paid by him over the amount which the railroad company had a legal right to charge, or to offset this excess against the railroad company's charge if it bring an action of *assumpsit* against such shipper. In such action to recover back such excess of payments made beyond the legal rates of charge, there is no

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necessity for the plaintiff to prove that he demanded the payment of such excess by the railroad company before instituting such suit. West Virginia Transportation Co. *v.* Sweetzer, 22 Am. & Eng. R. R. Cas. 469 (25 W. Va. 434).

Freight Rates—Statute—Unit.—Construing art. 4257 Rev. Stat. of Texas, *held*, that a railroad has the right to charge for the carriage of any quantity of freight less than one hundred pounds the same amount which it is entitled to charge for one hundred pounds, one hundred pounds being the unit fixed by the statutes. The statutory remedy for overcharge in freight afforded by Act 4258, Rev. Stat., is not exclusive, but cumulative, and he who would recover the penalty provided by it must bring himself clearly within its terms. Murray *v.* Gulf, Col. & Santa Fé R. Co., 22 Am. & Eng. R. R. Cas. 464 (63 Texas, 407).

Payment of Insurnace above Price Charged for Carriage.—If a carrier gives notice that he will not be accountable for goods above the value of 20*l.* unless entered and an insurance paid over and above the price charged for carriage according to their value, a person who enters silk exceeding the value of 20*l.* and does not pay the insurance, cannot recover any part of the value of goods, if lost, although the price he agrees to pay for the carriage of the silk is, on account of its superior value, higher than the ordinary price charged for the carriage even of bulky articles, and although the carrier does not prove that the loss happened by any of those accidents against which the law makes him an insurer. A carrier is entitled to make a higher charge for superior silk attending the carriage of valuable goods, but the charge must be reasonable. Harris *v.* Packwood, 2 Taunt. 264.

Railway Clauses Act 8 *and* 9 *Vict. c.* 20, *s.* 90—*Equal-Rates Clause—Action to Recover Overcharges made by Company.*—The G. R. Co. leased a branch line on which T., a coal-owner, resided, and they made two tables of rates for coals—one applicable to the main line, and the other to the branch line, the latter being the higher of the two rates. When F. sent his coal along the branch line he was charged at the branch rates, but when his coals got to the main line, then at the main rates; whereas when coal-owners living on the main line, send their coals from the main line on to the branch line, they were charged for the whole distance (*i.e.*, both on the branch and the main line) at the main line rates only. The special act applicable to the branch line (which also incorporated the Railways Clause Act), provided that the rates should "be made equally to all persons in respect of goods passing over the same portion and over the same distance along the railway, and under the like circumstances, and no reduction or advance shall be made partially, either directly or indirectly, in favor of or against any particular person." *Ueld* (the two lords differing in opinion) that the rate charged upon F. was no violation of the Equal-Rates clause. But *held* by the Lord Leonards, who dissented, that it was a gross violation of that clause. Where a railroad company are bound by their act to make equal charges to all persons, and they make unequal

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charges, whether the person overcharged can by action recover back the difference? Lord Granworth, L. C. doubts whether he can. Lord St. Leonards is of the opinion he can. Finne *v.* Glasgow & S. W. R. Co., 26 L. T. 14.

Recovery of Excessive Charges.—In this action, originally brought to recover for an exaction of excessive charges for the carriage of goods, the statutory penalty of three times the excess, it was determined that such an action would not lie by reason of a repeal of the statute 43 Wis. 688. The prayer of the complaint was then changed so as to demand only the illegal excess. *Held*, 1. That this was in effect an amendment of the complaint itself, and that the question whether the action will lie under such amended complaint, is not *res adjudicata*. 2. That as the excessive charges are alleged to have been made "wrongly and fraudulently" the action may be regarded as still one in tort, and the amendment was allowable. 3. That the cause of action at common law now stated in the complaint was not repealed or suspended by the statute. Smith *v.* Chicago, etc., R. Co., 5 N. W. Rep. 424.

Regulation—Discrimination.—A State statute providing that a railroad company may receive for transporting, carrying and telegraphing, such tolls and charges as might from time to be established, fixed and regulated by the directors, and that the act should be construed literally so as to favor its purposes and objects, provided that nothing in it should be construed as preventing the legislature from regulating the rates of transportation for passengers and freight over the road, and provided further, that there should be no discrimination in favor of any road, does not deprive the State of its power, within the limits of its general authority, as controlled by the Constitution of the United States, to act upon the reasonableness of the tolls and charges so established, fixed and regulated. Subsequent legislation by the State fixing a maximum rate for other railroads does not apply to this road by virtue of the proviso as to discrimination. Stone *v.* New Orleans & Northern R. Co. (116 U. S. 606), 23 Am. & Eng. R. R. Cas. 606.

Regulation of, by Railway Commission.—The right of a State to reasonably limit the amount of charges by a railroad company for transportation of persons and property within its jurisdiction, cannot be granted away by its legislature unless by words of positive grant, or words equivalent in law. A statute which grants to a railroad company the right "from time to time to fix, regulate and receive the tolls and charges by them to be received for transportation," does not deprive the State of its power, within the limits of its general authority, as controlled by the Constitution of the United States, to act upon the reasonableness of the tolls and charges so fixed and regulated. An act of incorporation, which confers upon the directors of a railroad company the power to make by-laws, rules and regulations touching the disposition and management of the company's property, and all matters appertaining to its concerns confers no right which is violated by the creation of a State railroad commis-

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sion, charged with the general duty of preventing the exaction of unreasonable or discriminating rates upon transportation done within the limits of the State, and with the enforcement of reasonable police regulations for the comfort, convenience and safety of travellers and persons doing business with the company within the State. A railroad forming a continuous line in two or more States, and owned and managed by a corporation whose corporate powers are derived from the legislature of each State in which the road is situated, is, as to the domestic traffic in each State, a corporation of that State, subject to State laws not in conflict with the Constitution of the United States. This court agrees with the Supreme Court of Mississippi, that a statute creating a commission, and charging it with the duty of supervising railroads, is not in conflict with the Constitution of that State. The provisions of the statute of Mississippi of March 11, 1884, creating a railroad commission, are not so inconsistent and uncertain as to necessarily render the entire act void on its face. Stone *et al. v.* Farmers' Loan & T. Co. (116 U. S. 307), 23 Am. & Eng. R. R. Cas. 577.

The Natchez, Jackson & Columbus R. Co. by its charter may "fix, regulate and secure tolls charges" for transportation over its road. But such charges must be reasonable and are subject to control in respect of reasonableness by the legislature acting through a railway commission. The creation of such commission does not impair the charter rights of the company. But rates fixed by the commissioners are not conclusive against the railway company. Railroad Commissioners *v.* Natchez, Jackson & Columbus R. Co., 21 Am. & Eng. R. R. Cas. 17.

Reduced on Goods for "Farm Purposes"—Reduced Rates.—A bill of lading contained a stipulation that the freight on the articles to be transported should be $120 per car, and the further statement that such articles were to be used "for farm purposes." In an action by the shipper to recover the difference between such stipulated rate and full freight, which he had been obliged to pay, the carrier answered in substance that the stipulated rate was a reduced rate given only on articles to be used "for farm purposes," and that at the time the bill of lading was made out the shipper falsely represented that they were to be so used; and it was with such understanding that both stipulations were inserted in the bill of lading, while in fact the articles were not to be used "for farm purposes." *Held*, that the stipulation that the articles were to be used "for farm purposes" was as binding as the stipulation that they should be carried at the reduced rate, and that the shipper could not recover. Fry *v.* Louisville, N. A. & C. R. Co., 22 Am. & Eng. R. R. Cas. 442.

Maximum—Terminals—Division of Receipts—Allowance for Cartage—Mileage Proportion—Regulation of Railways Act, 1873.—By the Buckfastleigh, Tontnes and South Devon Railway Act, 1864, the company thereby incorporated were authorized to make a railway to be worked by horse-power only, and also a railway to be worked in the ordinary way, by locomotive steam-engines; and it was enacted that the maximum rate of

RATES—*Continued.*

charge for conveyance on the railways, including the tolls for the use thereof, and of carriages, and for locomotive power, and every other expense incidental to such conveyance, should not exceed certain amounts therein mentioned: *Held*, that the railway to be worked by horse-power was subject to this enactment, and that a higher rate of charge could not be made in respect of that railway, although such higher rate might be reasonable, having regard to the increased expense of working the railway by horse-power. By a working agreement between the S. D. R. Co. and the B. R. Co. it was provided that there should be a division for the receipts from the B. R., which was to be worked and managed by the S. D. Co., who were to receive all tolls, fares, rates, and charges arising from the B. R., including "one half of all terminal charges, and a mileage proportion in respect of the B. R. Co., of all through fares, rates, and charges:" *Held*, that the S. D. Co. were bound to bring into the receipts and account to the B. Co. for one half of all terminals included in fares, rates, and charges earned on the B. R. and S. D. R., and also on the B. R. and any other railway or railways. It appeared that the S. D. Co. in some cases carted the goods to and from the stations, and the cartage rate was included in the goods rate: *Held*, that they were justified in deducting from the receipts to be divided between them and the B. Co. the average cost to the S. D. Co. of performing the cartage. It also appeared that the S. D. Co., in conveying goods from the B. R. to a line leading from their own railway, were compelled, through not having any siding or other accommodation at the junction, to convey goods three miles beyond the junction to a station on their line, and then to send them back to the junction by another train; and they claimed in such case to credit themselves with the mileage one way, namely, the three miles, in estimating the mileage proportion between the two companies: *Held*, that they were entitled to do so. Buckfastleigh, Tontnes & South Devon R. Co. *v.* South Devon R. Co., 1 Nev. & Mac. 321.

Package Rates—Equality Clause.—The Great Eastern R. Co. fixed certain package rates for the conveyance of fish from Yarmouth to London, as follows:

Under and not exceeding

18 lbs.,	3*d.*	per package.,	
28 "	4*d.*	"	"
42 "	6*d.*	"	"
56 "	8*d.*	"	"

W., a trader at Yarmouth, sent packages of fish in baskets of 20 lbs. weight by the Great Eastern R. to London, for which he was charged, under the above scale, at the rate of 4*d.* for 28 lbs. It was proved that he could not alter the size of his baskets without injury to his business, and that baskets 21 lbs. in weight did not cost the company more expense or labor than baskets of 18 lbs. in weight. *Held*, that the rate must be 21 lbs. and not 18 lbs. for 3*d.*, so as to make it uniform, and after the same rate

RATES—*Continued.*

as and in due proportion with the charge for packages of great weight. Woodger *v.* G. E. R. Co., 2 Nev. & Mac. 102.

Parcel Rates.—See Robertson *v.* G. S. & W. R. Co., 2 Nev. & Mac. 374.

Services Incidental to Business of Carrier covered.—On the hearing of an application made under the Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), s. 15, the Railway Commissioners have power to state a special case for the opinion of the High Court. By the London, Brighton & South Coast Railway Act, 1863 (26 & 27 Vict. c. ccxviii.), s. 51, "the maximum rates of charges to be made by the company for the conveyance of animals and goods, including the tolls for the use of their railways and wagons or trucks and for locomotive power and every other expense incidental to such conveyance (except a reasonable sum for loading, unloading, and covering the goods at any terminal station of such goods, and for delivery and collection, and any other services incidental to the duty or business of a carrier, where such services or any of them are or is performed by the company), shall not exceed" certain sums prescribed; *held*, that station accommodation, the use of sidings, weighing, checking, clerkage, watching, labelling, provided and performed by the company in respect of goods traffic carried by them as carriers, may be and are *prima facie* "services incidental to the duty or business of a carrier" within s. 51. Whether they are so in any particular case is a question of fact for the Railway Commissioners to decide; and if found by them to be so, such services may be the subject of a separate reasonable charge in addition to the rates prescribed. Hall & Co. *v.* London, Brighton & S. C. R. Co., 22 Am. & Eng. R. R. Cas. 446 (L. R. 15 Q. B. Div. 505).

Small Parcel Rates.—By the 171st section of the 5 & 6 W. IV. c. 107, the Great Western R. Co. were authorized to fix the sum to be charged in respect of small parcels (not exceeding 500 lbs. weight) as to them seem proper: provided that that provision should not extend to articles, matters, or things sent in large aggregate quantities, although made up of separate and distinct parcels, such as bags of sugar, coffee, etc., but only to single parcels unconnected with parcels of a like nature, which might be sent upon the railway at the same time. The company issued "scale bills" specifying the charges to be made for carriage, each class containing various kinds of goods, and at the end a "miscellaneous class" comprising goods "not aggregate of one class or kind," for which a higher tonnage rate was exacted and also an additional charge of *2d.* per package. *Held*, that the company were not justified in charging, under the "miscellaneous class" goods which were aggregate of several kinds, but all contained in one class. Edwards *v.* Great Western R. Co., 11 C. B. 588.

Same Charge for Delivery at Different Stations Unequal.—The Grand Junction R. Co. published a list of rates for the carriage of merchandise, divided into seven classes, of which the lowest was 16*s.* and the highest 60*s.* per ton, and for "boxes, bales, hampers, or other packages, when they contained parcels or other packages or things under 112 lbs. weight

RATES—*Continued.*

each, directed, consigned, or intended for different persons or for more than one person," they imposed a charge of 1*d.* per lb. weight. *Held*, that this last was not a reasonable charge in the case of a package above 500 lbs. weight, made by a carrier and directed to one person, although containing a number of parcels under 112 lbs. weight each consigned or directed to different persons. The company also became carriers on the London & Birmingham line, and published a list of charges for the carriage of goods from Manchester to London, among which "Manchester packs" were charged 3*s.* 3*d.* per cwt., or 65*s.* per ton. At the foot of this list was a notice that goods were brought to the station at Camden Town "without extra charge," and that there was "no charge for booking or delivery at London." The company made an agreement with C. & H. that the latter should carry from the station at Camden Town and deliver in London all such goods carried by the railway, and for so doing should receive 10*s.* per ton out of the entire charge, 65*s.* per ton. *Held*, that under these circumstances the charge of 65*s.* per ton, when made to any other persons who were ready to receive their goods at the station at Camden Town, was both unreasonable and unequal. Pickford *v.* Grand Junction R. Co. 10 Meeson & W. 397.

Charges for Collection and Delivery—Overcharges.—By special acts a railway company were entitled to charge for goods carried on their line at rates not exceeding a certain rate per ton. They were permitted to charge a higher rate for small parcels not exceeding 500 lbs. weight, provided that "articles sent in large aggregate quantities, although made up of separate parcels such as bags of sugar, coffee, meal and the like, shall not be deemed small parcels, but such term shall apply only to single parcels in separate packages." Plaintiff, a carrier, sent to the company at once many packages, all consigned to one consignee, each one less than 500 lbs., of articles of similar classes, but not being separate packages of one article. The company charged for them as separate parcels. *Held*, that they were justified in so doing, the proviso applying only to articles that were of such a nature that a large quantity was generally made up in separate packages. The plaintiff also sent a parcel of coffee less than 500 lbs. weight, and afterwards on the same day another parcel of coffee, both consigned to himself and for the same train. When the first was left, notice was given that plaintiff would probably send more; but it was not received on any special terms. The company charged for these as separate parcels. *Held*, that they were justified in doing so. The company were entitled to charge a certain rate "for all cotton and other wools, drugs, and manufactured goods." *Held*, that this meant, not all goods on which human skill was employed, but those articles made in what are in popular language called manufactories. The company agreed with agents to collect and deliver goods for them, charging the public a small charge for doing so in addition to the charge for conveyance on the railway. To those agents the company allowed in addition a sum out of the receipts of the company. The plaintiff, who collected and delivered his own par-

RATES—*Continued.*

cels, but was charged as highly as the rest of the public, complained that in effect this arrangement caused his goods to be charged higher than those sent through the agents, and that the difference was an overcharge. By their act the company were to charge all persons equally for conveyance, but there was a proviso that they might make arrangements as to the collection and delivery of merchandise, and there was an appeal given by the act to the Session, by any one prejudiced against any arrangement giving special facilities to others. *Held*, that under these enactments the agreement with the agents, against which there had been no appeal, did not render the charges to the plaintiff overcharges. Parker *v.* Great Western R. Co., 6 El. & B. 77.

Packed Parcels.—The plaintiff, a carrier, was in the habit of collecting small parcels and sending them together in large packages by the defendants' railway. The defendants charged different rates of carriage for different classes of goods, the highest charge being for packed parcels. A declaration was required from the plaintiff as to the description of his parcels. He declared them as "packed parcels," and was charged and paid, accordingly. The plaintiff finding that other firms sent packed parcels from whom no declaration was required, and who were charged, for them at a less rate, sued the company in *assumpsit* to recover the alleged excess as for money had and received. On the trial he gave evidence that the practice of the other firms in sending "packed parcels," was notorious. *Held*, affirming the judgment of the Court of Exchequer Chamber, that the evidence produced was admissible, and was sufficient to show that the defendants knew of the practice of the other firms to pack their parcels, and that with such knowledge they had improperly charged the plaintiff with a higher rate of charge, and had thus infringed the equality clauses, and that the plaintiff was entitled to recover the amount so charged in excess in an action for money had and received. Great Western R. Co. *v.* Sutton, 38 L. J. Exch. 177 (H. of L.).

Unauthorized Rates and Fares—Infringement of Special Act.—Upon complaint that a railway company did not afford "all reasonable facilities" within the meaning of sec. 2 of the Railway and Canal Traffic Act, 1854, because they charged passengers in excess of the sums they were entitled to demand under the maximum clause of their special act: *Held*, by the court of appeal (affirming the judgment of the Queen's Bench Division) that the Commissioners had no jurisdiction to entertain the complaint, because the mere fact that a railway company charged beyond the maximum sums contained in their special act, did not amount to a refusal to afford reasonable facilities."

Per BRAMWELL, L. J.—The words in sec. 2 of the Railway and Canal Traffic Act, 1854, "Every railway and canal company shall afford all due and reasonable facilities for the receiving and forwarding of traffic," have no reference to the prices a railway may charge for conveyance. *Semble*, if the complaint had not merely alleged that there were overcharges, but that such charges were made either as regards particular trains, or as regards

RATES—*Continued.*

particular stations to such an amount as to prevent, or to be calculated to prevent, the use of these trains or the traffic to these stations, it would be refusing reasonable facilities for receiving and forwarding passengers by those trains; and if it was proved to be done with the object of preventing the use of the accommodation, the Commissioners would have jurisdiction to entertain the matter. Brown *v.* Great Western R. Co., 3 Nev. & Mac. 523.

Upon proof that a railway company had charged more than they were entitled to take under the maximum clause of their special act, the Commissioners made an order under sec. 2 of the Railway and Canal Traffic Act, 1854; enjoining the railway company to desist in future from exceeding the limit prescribed by their special act. Lloyd *v.* Northampton & Banbury Junction R. Co., 3 Nev. & Mac. 259.

Unequal.—A railway company agreed with A & B, coal-owners, that they would carry their coal, subject to clause 11, at certain charges given in the schedule, and they also agreed (clause 9) that in the event of their charging any other trader for the same description of traffic lower rates than those stipulated to any station, then in that event A & B were to have a corresponding reduction in the rates payable by them to such station. Clause 11 was to effect that notwithstanding the rates or charges before specified, they were entitled to charge A. & B. rates or charges similar to those charged and paid by the Eglinton Coal Co.; and in the event of any consideration being given to the Eglinton Co. for raising them, a similar consideration shall be given to A & B. The railway company charged D, another coal-owner, not a party to the agreement, a lower rate per ton, taking into account the greater distance the coal was carried. The agreement with the Eglinton Co. was not in evidence. It was alleged the rate charged A & B was not higher than that charged to the Eglinton Co.: *Held*, affirming the decision of the court below, that there was nothing in clause 11 to supersede the effect of clause 9, and that upon the true construction of the latter clause A & B were entitled to a corresponding reduction with D., and repayment of overcharges; "lower rates" meaning proportionately lower rates per ton per mile, and not a less sum per ton irrespective of the distance carried. Glasgow & D. W. R. Co. *v.* Mackinnon, 27 Am. & Eng. R. R. Cas. 1.

Unequal—Court of Chancery will not Interfere, unless Public Interest requires it.—The Birmingham & Derby Junction Railway commencing at Derby, communicates with the London & Birmingham Railway at Hampton-in-Arden. The Midland Counties Railway forms a communication between Derby and the London & Birmingham Railway at Rugby. The Birmingham Railway Act empowers that company to receive from passengers conveyed by the company's carriages tolls not exceeding a specified amount. A subsequent act for authorizing an alteration in the line of the railway, provides that the charges by the first act authorized to be made for the carriage of passengers, goods or other matters or things, shall be at all times charged equally and after the same rate per ton per mile, in re-

RATES—*Continued.*

spect to all passengers and goods of a like description, and conveyed or propelled by a like carriage or engine, passing on the same portion of the line only, and under the same circumstances, and that no reduction or advance in any charge for conveyance by the company, or for the use of any locomotive power to be supplied by them, shall be made either directly or indirectly in favor of or against any particular company or person travelling upon or using the same portion of the railway under the same circumstances. After the opening of the Midland Counties Railway, the Birmingham & Derby Junction R. Co. charged passengers conveyed by their carriages from Derby to Hampton-in-Arden 8*s.*, while they charged other passengers proceeding from Derby to Hampton-in-Arden, and thence to London, only after the rate of 2*s.*, between Derby and Hampton-in-Arden. An information was filled to procure an injunction to restrain the imposition of an unequal charge between the termini at Derby and Hampton. It was admitted by the information that the charge of 8*s.* did not exceed the rate allowed by the act: *Held*, by the Lord Chancellor on a motion for an injunction, that the clause above set forth, was only meant to prevent the exercise of a monopoly to the prejudice of one passenger or carrier in favor of another. That even if this court had jurisdiction in such a case, it would not interfere, unless it were clear that the public interest required it; and that in this case it being admitted that the higher charge was not more than the act permitted, it did not appear that the public were prejudiced by the arrangement. The motion was refused with costs. Attorney-Gen. *v.* Birmingham & Derby Junction R. Co., 2 Eng. Railway & Canal Cas. 24.

Right to Fix.—See Midland R. Co. *v.* G. W. R. Co., 2 Nev. & Mac. 88.

Whether Charge is Rate or Toll.—What determines whether a charge is a rate or toll is, not who provide the carriage or who provide the engine, but who are the carriers. Watkinson *v.* Wrexham, etc., R. Co. (No. 1), 3 Nev. & Mac. 5.

RATING OF RAILWAY.—*Poor Rate Railway and Dock—Ratable Value—Collection and Delivery Charges—Terminals—Working Expenses—Costs of Repairs—Renewal and Maintenance—Machinery Fixtures—Tenants' Capital and Profits.*—On appeal against the amount at which a railway was assessed to the poor rate, it appeared that the line belonged to one company, but was worked by another railway company, who found all the rolling stock in consideration of receiving a percentage of the gross receipts: *Held* that such percentage must be taken to represent the expense of the rolling stock to the hypothetical tenant, and that there would be no tenants' capital or profits thereon; to provide for personal superintendence and the responsibility of becoming tenant, at a heavy rent, the tenant was entitled to a fair remuneration, which was fixed at five per cent on the gross receipts. In the ordinary case, however, of a railway company finding the rolling stock for their own railway: *Held*, that the tenant might be allowed twenty per cent upon his tenants' capital for profits, depreciation of stock, and casualties; ten per cent upon his stores, and five per cent upon his floating capital; and that he was also entitled to a deduction

RATING OF RAILWAY—*Continued.*

for a renewal of way and works, as well as for maintenance of the same. Machinery fastened to the soil or to buildings only for the purpose of steadying it in working, is a chattel, and properly forms part of the tenant's capital. Terminals must be brought into the gross receipts and confined to the line of railway that earns them. Collection and delivery, strictly so called, form no part of terminals or terminal service, and being performed off the line should not in any way be brought into the accounts for rating purposes. Where, therefore, it is included in the rates for conveyance, as in carted rates, the cost of the service and reasonable profit thereon should be deducted from them in the gross receipts, and no receipt or expenditure relating to them should appear on the accounts. In order to obtain the cost of repairs of carriages and wagons, the company divided the actual cost by the number of train miles run on their own lines, but it appearing that they ran also upon their own lines, *held*, that the additional mileage should be taken into account so far as it was ascertainable for the purpose of arriving at a correct ratio of the cost of these repairs. Docks belonging to a railway company were connected with their line of railway which they helped to feed with traffic and included warehouses, sidings, and rails laid down over a portion of the docks (so called) to take goods to and from the railway. The expenditure on account of the docks exceeding the receipts, they possessed no ratable value as docks beyond that of unimproved land: *Held*, as a matter of fact, that the basins, wharves, and other parts belonging to the sea transit, and being strictly within the definition of docks, should be treated as such and rated only as unimproved land, while the building, sidings, and rails belonging to the land transit should be treated as part of the railway, and rated as a portion of the adjoining goods station. Manchester & Trent, etc., R. Cos. *v.* Guardians of Caistor & Glandford Brigg Unions, 2 Nev. & Mac. 53.

Stations—Sidings—Trade Profits—Repairs of Stock.—Owners' Wagons.—On appeal against the amount at which a railway and its stations were assessed to the poor rate: *Held*, (1) As to the stations, that in ascertaining how much of the adjacent land occupied by the railway formed part of the stations, and an element of their ratable value as distinguished from the line itself, all sidings, for whatever purpose used, should be included, and only the average quantity of the land required for the main tracks, and only the permanent way necessary to such tracks at any point in their length should be excluded. (2) The railway company made and repaired their own rolling stock, and claimed to deduct trade profits on such repairs. *Held*, that they were not entitled to deduct any trade profits on such repairs; *held*, that they were not entitled to deduct any sum for profits in respect thereof. (3) The railway company, in conducting a portion of their traffic, used the wagon stock of private owners and of other railway companies. They carried to the account of their gross receipts the amount earned by means of such wagons, but the value of the wagons did not appear in the tenant's capital account of rolling stock, and, therefore, no profits thereon was allowed as a deduction under that head. The company claimed, however, under a separate head, a deduction of ten per

RATING OF RAILWAY—*Continued.*

cent upon the value of these wagons, upon the ground that it represented the amount of trade done in them by the company upon which the profits should be deducted. *Held*, that the profits should be deducted, but as it appeared that the number of train miles run by owners' wagons was much less than the number run by those of other companies, five per cent would be allowed upon the former, and ten per cent upon the latter. (4) The value of fixed machinery permanently attached to the freehold is landlord's property, and ratable, and should not be deducted as part of tenant's plant or capital. (5) Seventeen per cent upon tenant's capital allowed (under the circumstances) for profit, interest, insurance, and deterioration; 10 per cent upon the capital invested in stores, and 5 per cent upon floating capital (in this case fixed at £300,000); £50 per lineal mile allowed to be deducted for the landlord's expenses in maintaining the premises in a state to command the same rent. (6) Grounds upon which the year of assessment should be selected for the valuation, working expenses, etc., rather than an average number of years. London & N. W. R. Co., *v.* Wigan Union, 2 Nev. & Mac. 240.

REASONABLE ACCOMMODATION.—See Caterham R. Co., *v.* Brighton and Southeastern R. Cos., 1 Nev. & Mac. 32.

REASONABLE FACILITIES.—See Aberdeen Lime Co. *v.* Great North of Scotland R. Co., 3 Nev. & Mac. 205.

REBATES.—See Kempson *v.* Great Western R. Co., 4 R. & Canal Traffic Cas. 426.

RECEIVING, FORWARDING AND DELIVERING.—See Diphwys Casson Slate Co., *v.* Festiniog R. Co., 2 Nev. & Mac. 278.

REASONABLENESS OF CHARGES.—In considering the question of the reasonableness of charges, the principle is not what profit it may be reasonable for a railway company to make, but what it is reasonable to charge to the person who is charged. International Bridge Co. *v.* Canada Southern R. Co., 8 App. Cas. 723.

REFERENCE OF QUESTIONS UNDER SEC. 3 OF THE RAILWAY AND CANAL TRAFFIC ACT, 1854.—Nicholson *v.* Great Western R. Co. (No. 2) 1 Nev. & Mac. 143.

REFRESHMENT ROOMS.—See Southeastern R. Co. *v.* Railway Commissioners *et al.* 3 Nev. & Mac. 464.

REGULATION—*Control over Railroad—Corporations.*—Even conceding that the charters of railroad companies are contracts, the constitutional power of the legislature to prohibit unjust discrimination in freights still exists, and rests in the right of the legislature to prescribe the methods by which to enforce a common-law duty that such companies voluntarily assume when they exercise the function of a common carrier. Such legislation is in no respect a violation of their charters. Chicago, etc., R. Co. *v.* People, 67 Ill. 11.

REGULATION BY STATE—INTERSTATE COMMERCE.—A statute of Illinois enacts that if any railroad company shall, within that State, charge or receive, for transporting passengers or freight of the same class, the same

REGULATION BY STATE—INTERSTATE COMMERCE—*Continued.*

or a greater sum for any distance than it does for a longer distance, it shall be liable to a penalty for unjust discrimination. The defendant in this case made such discrimination in regard to goods transported over the same road or roads from Peoria in Illinois and from Gilman in Illinois to New York, charging more for the same class of goods carried from Gilman than from Peoria, the former being eighty-six miles nearer to New York than the latter, this difference being in the length of the line within the State of Illinois.

1. This court follows the Supreme Court of Illinois in holding that the statute of Illinois must be construed to include a transportation of goods under one contract and by one voyage from the interior of the State of Illinois to New York.

2. This court holds, further, that such a transportation is "commerce among the States," even as to that part of the voyage which lies within the State of Illinois, while it is not denied that there may be a transportation of goods which is begun and ended within its limits and disconnected with any carriage outside of the State, which is not commerce among the States.

3. The latter is subject to regulation by the State, and the statute of Illinois is valid as applied to it. But the former is national in its character, and its regulation is confided to Congress exclusively, by that clause of the Constitution which empowers it to regulate commerce among the States.

4. The cases of Munn *v.* Illinois, C. B. & Q. R. Co. *v.* Iowa and Peik *v.* The Chicago & Northwestern R. Co., all in 94 U. S., examined in regard to this question, and held, in view of other cases decided near the same time, not to establish a contrary doctrine.

5. Notwithstanding what is there said, this court holds now, and has never consciously held otherwise, that a statute of a State intended to regulate or to tax, or to impose any other restriction upon, the transmission of persons or property or telegraphic messages from one State to another, is not within that class of legislation which the States may enact in the absence of legislation by Congress, and that such statutes are void even as to that part of such transmission which may be within the State.

6. It follows that the statute of Illinois, as construed by the Supreme Court of the State, and as applied to the transaction under consideration, is forbidden by the Constitution of the United States, and the judgment of that court is reversed. Wabash, St. Louis & Pacific R. Co. *v.* People, (U. S. Supreme Court, Oct., 1886) 26 Am. & Eng. R. R., Cas. 1.

Whether the statutes gave to the Railroad Commissioners the right to regulate charges to points outside of this State, is a question of jurisdiction which may be raised at any time.

The general railroad law of this State was intended to confer upon the Railroad Commissioners the right to regulate freight upon all railroads where any part thereof was within this State, and to all stations on those roads, including stations outside of the State.

REGULATION BY STATE—*Continued.*

The power to regulate commerce among the States is given exclusively to Congress; the transportation of freight or the subject of commerce is a constituent part of commerce itself; the transportation of passengers or merchandise through a State, or from one State to another, is commerce among the States, and exclusively within the control of Congress; but, as a general rule, each State may control, as a matter of domestic concern, all the railroads and other things, proper subjects of public control, which are located entirely within the borders of the State, although such regulating control may affect incidentally general interstate commerce with which the subject may connect.

Transportation of merchandize through a State, or from one State to another, although the carriage may be continuous, is interstate commerce, and beyond the control of the State, even where Congress has taken no action upon the subject.

Any regulation of freights for the transportation from Columbia in this State to points in the State of North Carolina, by the statutes of the State, is beyond the power of the State, because of its being an invasion of the power exclusively vested in Congress by the Constitution of the United States. Railroad Commissioners *v.* Railroad Company (22 S. C. 220), 26 Am. & Eng. R. R. Cas., 29.

REGULATION OF FREIGHT CHARGES.—*Exemption from.*—A railroad corporation organized under the laws of Missouri, subsequent to the going into effect of the present constitution, and the laws passed thereunder, classifying and regulating the charges of railroads for carriage of freight, is subject to the provisions of such constitution and laws. It cannot claim exemption therefrom on the ground that it has purchased the privileges and franchises of a railroad corporation whose existence antedates that of the constitution and said laws. Under the evidence in this case, *held* that the defendant in its transaction with plaintiff did not violate the law (Mo. R. S., §§ 833, 834, 835) regulating charges for carrying freight. Owen *v.* St. Louis & San Francisco R. Co. (83 Mo. 454), 25 Am. & Eng. R. R. Cas. 371.

REGULATION OF RAILWAYS ACT.—See Goddard *v.* London & Southwestern R. Co., 1 Nev. & Mac. 308.

RELATIVE COST OF CARRIAGE.—See Ransome *v.* Eastern Counties R. Co. (No. 1), 1 Nev. & Mac. 63; Oxlade *v.* Northeastern R. Co. (No. 1), Ib. 72; Nicholson *v.* Great Western R. Co. (No. 1), Ib. 121.

RENT FOR USE OF STATION.—See Bristol & Exeter R. Co. *v.* Somerset & Dorset R. Co., 2 Nev. & Mac. 82.

REVIEWING COMMISSIONERS' DECISION.—*Application to Commissioners to Review their Decision—Order* 40 *of Commissioners' General Orders.*—The Railway Commissioners refused an application made under Order 40 of their general orders to review a decision given by them a year before. Denaby Main Colliery Co. *v.* Mnachester, etc., R. Co., 4 R. & Canal Traffic Cas. 23.

The Commissioners will not rehear a matter when the party applying

REVIEWING COMMISSIONERS' DECISION—*Continued.*

does not desire to disturb their judgment on the merits. Hammans *et al. v.* Great Western R. Co., 4 Ry. & Canal Traffic Cas. 181.

REVIEWING PREVIOUS DECISIONS.—See Palmer *v.* London & Southwestern R. Co., 1 Nev. & Mac. 243.

REVISION OF WORKING AGREEMENT.—See Corporation, etc., of Huddlesfield *v.* Great Northern R. Co. *et al.*, 4 R. & Canal Traffic Cas. 44; Greenock *v.* Wemyss Bay R. Co. *v.* Caledonian R. Co., 2 Nev. & Mac. 132.

ROUTES, ALTERNATE.—See Caledonian R. Co. *v.* North British R. Co., 3 Nev. & Mac. 403.

RUNNING POWERS.—See Swindon, etc., R. Co. *v.* Great W. R. Co., 4 R. & Canal Traffic Cas. 173; Hammans *v.* Great Western R. Co., Ib. 18.

RUNNING POWERS.—*Conditions on which granted—Parties.*—The B. & D. R. Co. had powers under their special act of running over the railway of the C. R. Co., and the terms and conditions upon which they were to exercise such powers for through passenger traffic were referred to the decision of the Railway Commissioners. It appeared that the G. W. R. Co. worked the line of the B. & D. Co., and would exercise the running powers so claimed. *Held*, that the G. W. Co. should be made the parties of the arbitration; that the total to be paid for the running power should be a mileage proportion of the through fares less government duty, and a percentage (20 per cent) for working expenses, and that the conditions of the exercise of such power should be (1) that, if the running company required works to be constructed they should bear the cost in the first instance, the owning company paying them five per cent upon the outlay; (2) that the hours of arrival and departure of the trains of the running company, should be fixed by them, and, if objected to by the owning company, should be fixed by the Commissioners, and (3) that in the interest of public safety, the trains of the running company, in passing along a viaduct which crossed an estuary of the sea, should not exceed in weight the ordinary goods trains of the owning company, nor in speed the ordinary passenger trains of the owning company. The Commissioners made the percentage for working expenses subject to revision every three years at the option of any of the companies. Bala & Dolgelly R. Co. *v.* Cambrian R. Co., 2 Nev. & Mac. 47.

Construction of Act—Rebate—Amalgamation.—The N. W. R. Co. had, by an agreement in 1864, running powers over the Cambrian R. Co.'s line (which joined their line at W., where it formed the only place of junction), and paid a rebate in respect of traffic sent from the Cambrian line to their line. By a subsequent Act of Parliament in 1867, the Carnarvonshire and Cambrian R. had mutual running powers, their lines forming a junction at A. The line of the Carnarvonshire Co., and all their rights and obligations, were transferred to the N. W. Co. by an act which provided that the N. W. Co. should not run over the Cambrian Co.'s line, via A., without the consent of the Cambrian Co., and *vice versa*. After the amalgamation, the Cambrian Co. claimed rebate under the agreement in respect to traffic sent to the Northwestern Co.'s line, via A. *Held*, that

RUNNING POWERS—*Continued.*

the proviso in the act only applied to the mutual running powers given by the Act of 1867 above mentioned, and not to the running powers given by the agreement of 1864, which still remained, and that the Cambrian Co. were entitled to the rebate claimed upon sufficient traffic as was sent by A. Cambrian R. Co. *v.* London & N. W. R. Co., 2 Nev. & Mac. 311.

Construction of Agreement.—The Scottish Central and Scottish Northeastern Railways were amalgamated with the railways of the Caledonian R. Co. by their special acts of 1865 and 1866, but the right of running over them was reserved to the North British R. Co. By an agreement which the two companies entered into in 1873, it was agreed (Clause 10) that the North British should not exercise running powers via Greenhill, Larbert, or Stirling for coaching traffic over any portion of the Caledonian Co.'s lines under the provisions of the Scottish Northeastern Railway Act 1866; provided always that when the bridge over the Tay was opened, the North British should be entitled to exercise their running powers between Greenhill and Stirling for all coaching traffic between Stirling and Fife, passing over the Tay bridge. *Held*, that the clause only suspended in respect of either Edinburgh or of Glasgow traffic the running powers on the north side of the Tay (or over the Scottish Northeastern lines) until the bridge was opened, and that as to the running powers between Greenhill and Stirling on the Scottish Central, the North British might clearly use them to carry traffic to and from Glasgow and soon as the bridge was opened, and that the right to runbetween Greenhill and Stirling included the right to carry traffic which was not conveyed over the whole distance between Greenhill and Stirling. North British R. Co. *v.* Caledonian R. Co., 3 Nev. & Mac. 273.

Construction of Special Act—Apportionment of Receipts—Season and Traders' Tickets.—By act of parliament, the N. B. R. Co. was given running powers over the Scottish Central line of the Caledonian R. Co., and it was provided that the N. B. Co. should fix the rates and fares in respect of traffic passing over the Scottish Central line and the lines of the N. B. Co. (called East Coast traffic), and that the receipts should be divided between the two companies according to the mileage, subject to certain minimum rates per mile in respect to such traffic which the Caledonian Co. was entitled to receive, provided that when the Caledonian Co. carried competitive traffic at rates or fares below these minimum sums, such low sums should be adopted in lieu of the minimum sums fixed. The N. B. Co. issued season and traders' tickets (the latter are tickets at reduced rates issued to traders supplying a certain amount of goods traffic to the railway) between places on their own and the Scottish Central line, and they claimed to fix the rates at which they charged for them according to the whole amount of the traders' traffic over their system. *Held*, that the Caledonian Co. were only entitled to a sum per mile of the Scottish Central line travelled by a holder of a season or traders' ticket not less than the sum per mile which they received from holders of season or traders' tickets issued by themselves in respect of traffic competing with the East Coast traffic, but that the qualification of such traders' tickets

RUNNING POWERS—*Continued.*

issued by the N. B. Co. must be in respect of East Coast traffic exclusively. Caledonian R. Co. *v.* N. British R. Co., 2 Nev. & Mac. 271.

Interfering with Local Traffic.—There were two routes for traffic between Ayr and the Ayrshire coast and Glasgow. The Glasgow & Southwestern R. Co. had the shorter and more direct route, and the Caledonian Co. were interested in the alternative route via Muirkirk, they having a railway of their own from Glasgow to Muirkirk, and running powers over the lines of the Glasgow & Southwestern Co. from Muirkirk to Ayr. Those running powers were conferred by an act which at the same time protected the local traffic of the company, whose lines were to be run over by an enactment by which it was provided as follows, Sec. 33, "Nothing in this act contained shall authorize the Caledonian R. Co. to carry or interfere with any traffic arising and terminating on the railways of the Glasgow & Southwestern R. Co." The applicants, in the exercise of such running powers, claimed to carry traffic between Ayr and their own station at Glasgow, but the respondents contended that the applicants were prohibited by sec. 33 from interfering with or carrying such traffic. *Held*, that sec. 33 applied only to traffic destined for delivery at points actually upon the respondents' railways, and that traffic for delivery at a part of Glasgow other than the respondents' terminus there (such as the applicant's station) was not within that section, the terms of which could not be extended so as to make the expression "the railways of the company" equivalent to "the districts served by the company's railway." Caledonian R. Co. *v.* Glasgow & Southwestern R. Co., 3 Nev. & Mac. 395.

Remuneration for—Allowance of Working Expenses.—By an act of parliament the M. R. Co. were given running powers over a line of the N. & B. R. Co., twenty-nine miles in length, at such through rates as they might fix on their own responsibility, the amount to be paid to the N. & B. R. Co. to be settled by the Railway Commissioners. *Held*, that, in the absence of special circumstances, where the line run over is of the length of twenty-nine miles, proportion by mileage is a sufficient payment for the exercise of running powers, but that M. Co., being able without consent to fix the rates over the N. & B. R., must pay an additional 5 per cent to the N. & B. Co.'s share of net receipts by mileage, 40 per cent of the gross receipts, less terminals, being allowed the M. Co. for working expenses. Midland R. Co. *v.* Neath R. Co., 2 Nev. & Mac. 366.

Remuneration for—Alteration of Broad Gauge Line—Mileage Division—Tolls—Construction of Special Act—Delay—Interest—Fixing Rates—Revision.—A narrow-gauge railway company which joined the line of a broad-gauge company were, under various acts of parliament, possessed of the right to require the latter to lay down a third rail, so as to render their line capable of carrying narrow-gauge traffic, and to enable the narrow-gauge company to run over the broad-gauge company's line into their own station at P., the terms for the construction and the terms for the use of the additional rail, in case of this agreement, to be settled by the board of trade. The broad-gauge company contended that, under the words of the provision contained in the above-mentioned acts, the terms as to

RUNNING POWERS—*Continued.*

construction and uses were to be separate and cumulative. *Held*, that the whole subject of terms and their incidence was left to be settled in any way that circumstances might require; and considering that the Board of Trade had power under the original acts of the broad gauge company (or their predecessors) in the interests of the public, to compel them to add a rail for narrow-gauge traffic, and that the further powers over the line granted to the narrow-gauge company were in lieu of a scheme for a separate route into P: *Held*, that the broad-gauge company were not in so good a position as they would have been had they in the outset had unconditional possession of their district and been required to cede running powers to a competitive company, and add to a line not constructed with any such prospect, and that the claim to receive interest and tolls as a twofold consideration ought not to be entertained, but that the right mode of paying the broad-gauge company for the extra rail and use of their line was by a mileage division of traffic receipts, their proportion of such receipts being guaranteed by the running company to amount to not less than 5 per cent per annum upon their expenditure in respect of the extra rail, and a sum equal to 3 per cent per annum thereon in respect of maintenance. Except as regarded local traffic, the running company was allowed to fix the rates at which they carried, the owning company having power to demand a reference to arbitration, pending which the disputed rates were to remain in force. Taking into account that much of the traffic would be carried for long distances, a general deduction at the rate of 27½ per cent was allowed for working expenses. The owning company having, owing to the delay of the running company, incurred their expenditure unnecessarily early, the running company were ordered to pay interest at 5 per cent upon such expenditure during the delay. The amount of outlay on the additional rail being disputed, the court ordered the accounts to be checked by the engineers of both companies, disputes as to amounts to be referred to an independent engineer, to be appointed by the Commissioners in default of agreement, and disputes in principle, as to what outlay was incurred of the additional rail, to be referred to the Commissioners. It appearing possible that the relative position of the companies might become altered, the decision was made subject, at any time after the expiration of three years, to revision, upon the application of any of the companies interested. South Devon R. Co. *v.* Devon & Cornwall, etc., R. Co., 2 Nev. & Mac. 348.

Remuneration for Exercise of.—In ascertaining the payment to be made by a railway company for the exercise of running powers over a portion of the line of another railway company, regard is to be had to the extent and remunerative character of the traffic of the running company over or in connection with such portion, and in the absence of exceptional circumstances it is proper to take their average net receipts per mile and to multiply the amount by the mileage of the portion so run over. But if the traffic on the portion run over is exceptionally profitable, then the mileage of such portion should be commuted by increasing it so as to make the payment in proportion to such difference. Another mode is

RUNNING POWERS—*Continued.*

to take a percentage for interest, and for maintenance and renewal upon the cost and value of the portion so run over; and if the use of the portion of the line be equal by the two companies, the running company should pay one half of this annual percentage. Whatever the amount to be paid by the use of the line, it should be in the shape of tolls, and should vary with the actual traffic of the running company from time to time, but for the use of the station a fixed rent may be adopted, the amount to be a percentage for interest and for maintenance and renewal upon the cost of the station, and to be payable by the running company in the ratio which their use of the station bears to the total use made of it. Carmarthen & Cardigan R. Co. *v.* Central Wales & Carmarthen Junction R. Co., 2 Nev. & Mac. 23.

Terms of Exercise of.—The respondents owned and worked a single line of railway 4¼ miles long, extending from the town of Swansea to The Mumbles. The applicants were empowered to make a system of tramways in Swansea and the suburbs, forming junctions with the respondents' line, which they had power to pass over and use with their carriages and servants, and for the purpose of traffic of all kinds. At the date of the applicants' act containing this power the respondents' line was worked by horse-power; subsequently, and at the date of the application, the respondents used steam-power: *Held*, that the applicants' running powers entitled them to use the respondents line with horse-power. The running powers were to be exercised on terms to be agreed upon, or, in default of agreement, to be settled by arbitration, and the owners of the railway were to make all arrangements required by agreement or arbitration in that behalf: *Held*, that "terms" included the necessary arrangements for regulating the joint traffic. The respondents had, for drainage purposes, rendered the space between the rails of their line unsuitable for horses to travel over; the Commissioners ordered the space to be made fit for horse traffic: *Held*, by Lush, J., and Manisty, J., and the Court of Appeal, that the Commissioners had not thereby exceeded their jurisdiction. *Semble*, that they would not have had jurisdiction to order a substantial alteration in the structure of the respondents' line.

Per THESIGER, L. J.—*Quære* whether they might not have made such an order under their general powers as a facility necessary to give communication. The plaintiff company had not completed the whole of their system of tramways: *Held*, that this was not a condition precedent to the exercise of their running powers. The remuneration to the owning company was fixed at two thirds of the net profit made by the running company's use of the line, a minimum being secured by a fixed yearly rent. Swansea Improvements Tramways Co. *v.* Swansea & Mumbles R. Co., 3 Nev. & Mac. 339.

SAME DESCRIPTION OF GOODS.—See Netshill & Lesmahagow Coal Co. *v.* Caledonian R. Co., 2 Nev. & Mac. 39.

SCALE OF CHARGES FOR CARRYING COALS.—*Coal Traffic—Natural Advantges of Position.*—A railway company adjusted certain districts within which they carried coals at reduced rates for quantities not less

SCALE OF CHARGES FOR CARRYING COALS—*Continued.*

than a train-load—200 tons. Those districts were so adjusted that the places where the complainants (coal dealers at T.) dealt, instead of being put into one district, were distributed into three, so that it was necessary for them, in order to take advantage of the reduced rates, to send three train-loads from T. into each district, which was more than their traffic demanded; whereas for dealers sending coals from P., a single district was constituted, comprising, besides other places, those at which the complainants dealt, and so afforded a traffic requiring coals enough to enable the P. dealers to take advantage of the lower rates. The court refused to interfere under the Railway & Canal Traffic Act 1854, sec. 2, it not being shown that the complainants were unduly subjected to this disadvantage, or that it was caused by undue preference; the adjustment of districts not being disadvantageous to the public at large, or objectionable in other respects. The company made a scale of charges for the carriage of coals from P. and from T. to places on their line at which the complainants dealt, the effect of which was to diminish the natural advantages which the position of the dealers at L., by reason of its greater proximity to those places, gave them over the dealers at P., by annihilating, in point of expense of carriage, a portion of the distance between P. and those places: *Held*, that an undue preference was thereby given to the dealers at P. Ransome *v.* Eastern Counties R. Co. (No. 2), 1 Nev. & Mac. 109.

Coal Traffic.—By a railway company's tariff, which had been previously sanctioned by the court, a reduced rate was published for the carriage of coals in quantities of not less than 200 tons, or 35 trucks, consigned to any one of certain specified districts. The company afterwards charged such reduced rate for the carriage of coals consigned by dealers at P., in the prescribed quantities of 35 trucks for one of such districts, though not carried by the company in one train-load all the way, the company for their own convenience, in consequence of steep gradients which would otherwise have required increased steam-power, detaching at C. some of the trucks from the train, and sending them on afterwards by the ordinary goods or other train to which the might be advantageously attached. None of the coals were ever left at C. for consumption there, but were all carried to the district to which they had been so consigned: *Held*, that by so doing the company had not given an undue preference to the consignors at P., since, the tariff being valid, it was immaterial how the company carried the coals most conveniently to themselves provided the tariff was not infringed. Ramsome *v.* Eastern Counties R. Co. (No. 4), 1 Nev. & Mac. 155.

SCALE OF CHARGES FOR CARRYING COAL.—See Foreman *v.* G. E. R. Co., 2 Nev. & Mac. 202.

SEASON TICKETS.—See Jones *v.* Eastern Counties R. Co., 1 Nev. & Mac. 45.

SEA TRAFFIC.—*Through Rates.*—The S. Steamboat Co. and the R. Steamboat Co. respectively, owned passenger steamboats plying between S. and R., and the B. and S. W. R. Cos. carried passengers by their own

SEA TRAFFIC—*Continued.*

lines to S., and having entered into a traffic arrangement with the steamboat company that their vessels should run between S. and R., in connection with the lines of the railway companies issued through tickets to passengers from places on their lines to R., available by the boats of the R. Steamboat Co., to the exclusion of the boats of the S. Steamboat Co. *Held*, that under the cirumstances, this arrangement did not amount to an undue preference of the R. Steamboat Co. The S. Steamboat Co. alleged that the fares charged by the railway companies in respect of the part of the journey performed on the steamboats of the R. Steamboat Co. were unreasonably high. *Held*, that this was a question that could not be raised by the S. steamboat company against the railway companies. South Sea & Isle of Wight Steam Ferry Co. *v.* London & S. W. and Brighton R. Cos., 2 Nev. & Mac. 341.

A railway company applying for through rates had agreed with C. for the carriage of passengers by steamers in connection with their lines. *Held*, that such steamers, and the traffic carried thereby, were within the provisions of the 11th section of Regulation of Railways Act, 1873. Greenock & Wemyss Bay R. Co. *v.* Caledonian R. Co., 2 Nev. & Mac. 227. See generally Napier *v.* Glasgow & Southwestern R. Co., 1 Nev. & Mac. 292; City of Dublin Steam Packet Co. *v.* London & N. W. R. Co., 4 R. & Canal Traffic Cas. 10.

SERVICES OFF THE RAILWAY.—See Watkinson *v.* Wrexham, etc., R. Co., 3 Nev. & Mac. 5; Watkinson *v.* Wrexham, etc., R. Co., Ib., 164; Watkinson *v.* Wrexham, etc., R. Co., Ib. 446; Aberdeen Lime Co. *v.* Great North of Scotland R. Co., Ib. 205; Dublin & Meath R. Co. *v.* Midland Great Western of Ireland R. Co., Ib. 379. See Diphwys Casson Slate Co. *v.* Festiniog R. Co., 2 Nev. & Mac. 73.

SHORT-DISTANCE CLAUSE.—The special act of a railway company provided that where goods were carried on the company's railway, or partly on their railway and partly on some other railway of which they were joint owners, or which they had a right to use, for a less distance than six miles, the company should be entitled to take tolls as for six miles. The act also provided that the tolls for goods carried over the company's line, and over portions of other lines of which they were part owners, or which they had a right to use, should be computed as if the company's line and and the said portions of the said other lines formed one railway. Goods were passed over the line of which the company were sole owners for a distance of less than six miles; the same goods, on the transit to their ultimate destination, passed over another line, of which the company was part owner, for a distance of more than six miles. This latter line was under the sole management of another company. The goods were accompanied by two declaration notes, one made out in the name of the first company, and the other in the name of the other company, but the station of ultimate destination mentioned in both notes was the same. *Held*, that the company was not entitled to split the contract; that the two lines must be treated as one; and that the six-mile clause was not applicable. Lancashire & Yorkshire R. Co. *v.* Gidlow (No. 1), 42 L. J. Ex. (H. L.) 129.

SHORT-DISTANCE CLAUSE—*Continued.*

See Merry and Cunningham *v.* Glasgow & Southwestern R. Co., 4 R. & Canal Traffic Cas. 383.

SHUNTING.—See Watkinson *v.* Wrexham, etc., R. Co., 3 Nev. & Mac. 5; Chatterly Iron Co. *v.* North Staffordshire R. Co., Ib. 238; Howard *v.* Midland R. Co., Ib. 253.

SIDINGS.—See Dublin Whiskey Distillery Co. *v.* Midland, etc., R. Co., 4 R. & Canal Traffic Cas. 32; Southeastern R. Co. *v.* Railway Comm'rs *et al.*, 3 Nev. & Mac. 538; Watkinson *v.* Wrexham, etc., R. Co., Ib. 5; Watkinson *v.* Wrexham, etc., R. Co., Ib., 164; Watkinson *v.* Wrexham, etc., R. Co., Ib. 446; Harborne R. Co. *v.* London & N. W. R. Co., 2 Nev. & Mac. 169; Jones *v.* N. E. R. Co., 2 Ib. 208; Dunkirk Colliery Co. *v.* Manchester, Sheffield & Lincolnshire R. Co., 2 Ib. 402; Diphwys Casson Slate Co. *v.* Festiniog R. Co., 2 Ib. 73.

SLATE TRAFFIC.—See Diphwys Casson Slate Co. *v.* Festiniog R. Co., 2 Nev. & Mac. 73; Holland *v.* Festiniog R. Co., Ib. 278.

SMALL PACKAGES RATES.—See Richardson *et al. v.* Midland R. Co., 4 R. & Canal Traffic Cas. 1.

SPECIAL ACTS—*Construction.*—The Railway and Canal Traffic Act, 1854, is to be read and considered with reference to the special acts of railway companies so far as the special acts extend or limit the facilities which are to be given to the public. Tharsis Sulphur & Copper Co. *v.* London & Northwestern R. Co., 3 Nev. & Mac. 455.

SPECIAL ACTS OF RAILWAY COMPANIES.—See p. 43, *n.* 214, 2 Nev. & Mac.

SPECIAL AGREEMENT.—See Marriott *v.* London & Southwestern R. Co., 1 Nev. & Mac., 47; Oxlade *v.* Northeastern R. Co., No. 1 Ib. 72; Harris *v.* Cockermouth & Workington R. Co., Ib. 97; Nicholson *v.* Great Western R. C., Ib. 121.

SPECIAL CONTRACT FOR CARRIAGE.—A fish merchant delivered fish to a railway company to carry upon a signed contract relieving the company as to all fish delivered by him "from all liability for loss or damage by delay in transit or from whatever other cause arising," in consideration of the rates being one fifth lower than where no such undertaking was granted; the contract to endure five years. The servants of the company accepted the fish, although from pressure of business they could not carry it in time for the intended market, and the fish lost the market. *Held*, that upon the facts the merchant had a *bona-fide* option to send fish at a reasonable rate with liability on the company as common carriers, or at the lower rate upon the terms of the contract; that the contract was in point of fact just and reasonable within sec. 7 of the Railway and Canal Traffic Act, 1854, and covered the delay, and the company were not liable for the loss. Manchester, etc., R. Co. *v.* Brown, 8 App. Cas. 703.

The fact that there are ordinary rates in practical operation on a railway for the carriage of goods with the ordinary liability is very strong evidence that an agreement between the railway company and a customer for the carriage of goods at another rate is reasonable. Manchester,

SPECIAL CONTRACT FOR CARRIAGE—*Continued.*

Sheffield & Lincolnshire R. Co. *v.* Brown, 8 App. Cas. 703; 53 L. J., Q. B. D. (H. L.), 124.

SPECIAL SERVICES.—A railway company's act, after providing the maximum rate of tolls to be charged, made an exception in respect of special services to be rendered by the company for loading, unloading, collection, and delivery of goods. *Held*, that the company were not entitled to charge for special services, though found by a jury to have been actually rendered by them; the customer was charged for such services, not having had the offer and option first distinctly given him of either availing himself of such services at the company's rate of charge, or of doing them himself, such services being incidental to the ordinary business of a carrier, and such as the customer, without notice, might have supposed were covered by the company's charges for toll. Lancashire & Yorkshire R. Co. *v.* Gidlow (No. 1) 42 L. J. Ex. (H. L.) 129. See Bellsdyke Coal Co. *v.* N. British R. Co., 2 Nev. & Mac. 105; Diphwys Casson Slate Co. *v.* Festiniog R. Co., 2 Ib. 73; Taff Vale R. Co. *v.* Rhymney R. Co. 2 Ib. 176; Dunkirk Colliery Co. *v.* Manchester, Sheffield & Linconshire R. Co., 2 Ib. 402.

STATION—*Accommodation.*—See Southeastern R. Co. *v.* Railway Commissioners *et al.*, 3 Nev. & Mac. 464; Local Board, etc., *v.* Northeastern R. Co., Ib. 48.

STATION.—A terminal station was jointly occupied by two railway companies under an agreement which secured to both companies an equal interest in the use of the joint passenger station. One of them entered into an agreement with a third company by which it was proposed to introduce its passenger traffic into the joint station and with that view a junction of two lines of railway was proceeded with. In an application for interdict at the instance of the company co-proprietor of the joint station, against this agreement being carried into effect. *held*, that this introduction into the joint station of the traffic of a third railway, although for a short distance it passed along the line of one the co-proprietors of that station, was a colorable attempt to give to the third the use and benefit of the joint station, which a co-proprietor had a right to resist. North British R. Co. *v.* Edinburgh & Glasgow R. Co., 16 Sc. Sess. Cas., 2d. Ser. 250.

Delivery at Particular.—See Thomas *v.* North Staffordshire R. Co., 3 Nev. & Mac. 1.

Foot Bridge at.—See Hollyhead Local Board *v.* London & N. W. R. Co., 4 R. & Canal Traffic Cas. 37.

STATUTE.—Construction of a special act as to whether the line vested and rent became due on completion of any part or only on completion of the whole line. Edinburgh & Glasgow R. Co. *v.* Stirling & Dunfermline R. Co., 15 Sc. Sess. Ca. (H. L.), 2d Ser. 48.

Sec. 88 of the Railway Clauses Consolidation (Scotland) Act, 1845, enacts, "that no tolls should be demanded or taken by the company for the use of the railway during any time at which the boards with lists of tolls were not exhibited, and milestones maintained." *Held*, that the section applied

STATUTE—*Continued.*

only to tolls for the use of the railway, and not to tolls charged by the company as common carriers for the conveyance of passengers and goods. Scottish Northeastern R. Co. *v.* Anderson, 1 Sc. Sess. Ca., 3d Ser, 1056.

Where an act of parliament confers upon a landowner a private right creating a burden upon a railway, and restraining the directors from regulating the traffic so as best to accommodate the public, it must be construed strictly. Turner *v.* London & Southwestern R. Co., L. R., 17 Eq. 561; 43 L. J., Ch. 430.

Construction of.—See Watkinson *v.* Wrexham, etc., R. Co., 3 Nev. & Mac. 164; Caledonian *v.* North British R. Co., Ib. 56.

STEAMBOAT.—See Napier *v.* Glasgow & Southwestern R. Co., 2 Nev. & Mac. 292.

STOPPAGE OF TRAINS.—See Caterham R. Co. *v.* Brighton & Southeastern R. Cos., 1 Nev. & Mac. 32.

STRUCTURAL WORKS.—See Southeastern R. Co. *v.* Railway Commissioners, 3 Nev. & Mac. 1.

TERMINAL SERVICES AND CHARGES—*Coal Traffic—Extraordinary Services—Construction of Special Act.*—A railway company were authorized by their special act to charge a sum for the conveyance of coal along the line, "including the tolls for the use of the railway, and wagon or trucks and locomotive power, and every expense incidental to such conveyance," which sum was to be a maximum sum, except in certain cases, the exception being thus expressed, "Provided always, that it shall be lawful for the company to demand and take, in addition to the tolls, rates, and charges which are hereinbefore authorized, a reasonable sum for the delivery and collection of goods, and other service incidental to the business of a carrier, where such services are performed by the company:" *Held* (upon the authority of the Lancashire & Yorkshire R. Co. *v.* Gidlow), that shunting the trucks containing the coals, and marshalling the said traffic, and finding, providing, and maintaining siding accommodation at their stations, together with unloading platforms, roads for the egress and ingress of carts and horses which are sent to cart away the coals, were not services for which a charge could be made under the proviso above set out. *Held*, also, that invoicing and taking accounts of all consignments, and keeping a staff for the purpose, and providing and maintaining office accommodation and giving notice to the consignees of each consignment, were not services for which a charge could be made, but were services which were incidental to conveyance, the remuneration for them being included in the mileage rate. Isle of Wight, etc., R. Co. *v.* Isle of Wight R. Co., 4 R. and Canal Traffic Cas. 128.

Extraordinary Services—Coal Traffic—Advising Consignee of Arrival of Traffic—Construction of Sec. 15 of Regulation of Railways Act, 1873.—Upon an application to the Commissioners under sec. 15 of the Regulation of Railways Act, 1873, to determine a dispute as to terminal services and charges, it was objected that the Commissioners had no jurisdiction if the nature of the service is questioned, and that they could only fix the

TERMINAL SERVICES—*Continued.*

amount to be paid for an admitted terminal service: *Held*, by the Commissioners, that under that section they have to say whether any given service performed by the railway company is one for which a terminal charge can be made, and if they think such service is incidental to conveyance, and covered therefore by the mileage rate, or not to be a service of the kind to which the power of the railway company to make a terminal charge applies, the Commissioners are authorized to decide that in such a case the rate for conveyance cannot be increased by the addition of a terminal charge. A railway company were authorized by their act to charge for coal a rate not exceeding 1*d.* per ton per mile for conveyance, and for everything incidental to conveyance, except loading and unloading, and also, "a reasonable sum for the loading, unloading, and covering, and for the delivery and collection of goods and other services incidental to the business of a carrier, where such services respectively shall be performed by the company, and a further reasonable sum for warehousing and wharfage, and for other extraordinary services, which may be reasonably and properly performed by the said company in relation to such goods." *Held*, that providing, maintaining, and working, signalling, and interlocking apparatus at a junction with a branch line to the colliery, was not an extraordinary service within that clause, because such branch line was not a private one, but a line or siding belonging to the railway company, and constructed and maintained at their cost, and to some extent used for general traffic as well as for coal from the colliery. Dunkirk Colliery Co. *v.* Manchester, etc., R. Co., distinguished. *Held*, that any charge the railway company might be entitled to make for the use of the signals in getting the coal trains down from the colliery onto the station siding is included in and covered by the sum of 1*s.* per wagon which they are paid for working this traffic on the branch line and into their station. *Held*, that the use of the signals afterwards in working the trains out of that siding on to the main line of the railway, and so forward to their destination, was only part of the ordinary course of working their line which the railway company have to take in respect of all traffic using their station, whether coming off this branch or not, and therefore not a service for which any terminal charge can be made. A customer who pays for the use of a railway acquires a right to use a junction between one part of it and another, and the cost of working the junction is an item of the cost of conveyance, the remuneration of which is included in the mileage rate. *Held*, that marshalling the trucks of a coal train by a railway company in their railway station and on their own siding, is not a service for which they can make a terminal charge, because such a service is incidental to conveyance and paid for in the mileage rate. *Held*, that the expense of invoicing the traffic and clerkage was one which a railway must necessarily incur for the purpose of conducting their own business, and an expense incidental to conveyance, and not a service for which a charge can be made under the clause above set out. *Held*, that advising consignee of arrival of traffic, obtaining consignee's signature, acknowledg-

TERMINAL SERVICES—*Continued.*

ing receipt of same, and clerkage, were services incidental to conveyance and not extraordinary ones, it being ordinarily the duty of a carrier to give notice to persons to whom goods are directed, of the arrival of the goods, at all events when delivery is to be taken at the office of the carrier, for the time that they ought to call for the goods is when the carrier is ready to deliver, and he alone is in a position to know when that is. *Held*, that providing and maintaining siding accommodation at the receiving station for full and empty wagons, taking empty wagons out of and placing full ones in the sidings, were services incidental to conveyance and not extraordinary ones; the undertaking to carry involving the duty of delivering safely, and providing sidings and depositing wagons in them being the essential acts by which such duty is performed. The applicants having substantially succeeded on their whole application, were granted their costs. Neston Colliery Co. *v.* London & N. W. R. Co., 4 R. & Canal Traffic Cas. 257.

Extraordinary Services—Station Accommodation and Services—Difference between Tolls and Rates.—A railway company were authorized by their special act to charge rates not exceeding stated sums per ton per mile, being "the maximum rate of charge to be made by the company for the conveyance of animals and goods, including the tolls for the use of their railway and wagons or trucks, and for locomotive power and every other expense incidental to such conveyance, except a reasonable sum for loading, covering and unloading of goods at any terminal station of such goods, and for delivery and collection, and any other service incidental to the duty or business of a carrier, where such services or any of them are or is performed by the company." The railway company's actual charge was considerably more than the mileage rate came to, and the excess was alleged to be the company's charge for (1) loading or assistance in and supervision of loading; (2) covering and uncovering, and use of sheets; (3) weighing, checking, watching, clerkage and labelling; these services being rendered partly for the benefit of the applicants; (4) special haulage and supply of empty wagons for loading. The outward traffic of the forwarding station being greatly in excess of the inward traffic, wagons are collected and conveyed empty to the forwarding station for loading, often from distant stations; (5) use of company's wagons off the company's premises and on the premises of the applicants; and (6) use of station accommodation and siding. *Held*, that the word "conveyance" in the above clause must be understood as taking in the whole course of the company's work as a railway carrier, from his acceptance of goods brought to him for the purpose of being forwarded to the moment of delivery at the termination of the journey, and that the words "everything incidental to conveyance" comprised station accommodation and services, and that those were, therefore, expenses, the payment for which was included in the rate, unless expressly excepted, and were not expenses for which the maximum rate could be exceeded. *Held*, that the word "covering" in the clause above set out included not only the labor of un-

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folding and making fast the sheets over a loaded wagon, but also the use of the sheets. *Held*, that as regards the applicants' traffic, that 6*d*. a sheet was a reasonable sum for the use of a sheet, it being proved that a sheet used in that traffic would make two journeys a week; that a reasonable charge for the labor of covering the loaded truck was 3*d*., if one sheet only was used, and 2*d*. each sheet if more than one. *Held*, that "weighing, clerkage, watching, and labelling" were services incidental to conveyance, and were covered by the maximum rate, because a railway company that carried goods contracted to take proper care of them in their passage, and to make a right delivery of them, and being thus liable, and having also to calculate the price of carriage according to class and tonnage, it finds it necessary in its own interests, to check, weigh, label and watch, and to write out way-bills, invoices and accounts. *Held*, that unless a company is put to same special expense in supplying wagons, the rate ought not to be increased on account of it, for the use of wagons for which a rate is payment involves a delivery of them for use in an ordinary way. *Held*, that charges made in respect of the time that wagons, loaded or unloaded on private sidings, were necessarily out of the railway company's possession and control, quite apart from any such undue detention as might give rise to claims for demurrage, were charges which ought not to be allowed, unless the way a company's wagons were dealt with in private sidings caused such wagons to earn less than when they did not go out of the company's sidings. Hall & Co. *v.* London, etc., R. Co., 4 R. & Canal Traffic Cas. 398.

Extraordinary Services—Station Accommodation—General Station Services—Loading and Unloading—Cartage.—The special acts of a railway company enacted that it should be lawful for them to demand in addition to the maximum mileage rate for the conveyance of goods, "a reasonable sum for loading, unloading, and covering, and the delivery and collection of goods and other services incidental to the business of a carrier, where such services respectively shall be performed by the company, and warehousing, wharfage, and any other extraordinary services which be reasonably and properly performed by the company in relation to the goods." The railway company's actual charge was considerably more than the mileage rate came to, and the excess was alleged to be the company's charge for (1) loading and unloading; (2) station accommodation; (3) shunting and placing wagons in position for loading and unloading, including use of junctions and expenses of working the same, and also haulage of the loaded wagons to place where they were picked up by the train; (4) advising applicants of the receipt of each consignment at the sending station to the applicant's order and asking for their instructions, with incidental clerkage, stationery and stamps; (5) weighing, checking, clerkage, watching and labelling at sending station; (6) advising the applicants at their request of the arrival of their goods of the receiving station, consigned there to their order, with clerkage, stationery and stamps; (7) clerkage, checking, and watching at receiving station. The services

TERMINAL SERVICES—*Continued.*

(2), (3), (4), (5), (6), and (7) were services for which they claimed to be authorized to charge either generally or as part of the expense of loading and unloading. Upon an application to the Railway Commissioners, under sec. 15, of the Regulation of Railways Act, 1873, to decide what were reasonable sums, if any, to be charged for such terminal services, in respect of the applicant's traffic: *Held*, that the services (2), (3), (5), (6), and (7), were services incidental to conveyance, and were not services for which a charge could be made under the clause above set out. *Held*, also, that the legal meaning in the special acts of railway companies of the words "load" and "unload" is no other than the sense in which they are used in ordinary English, and that the words are not applicable to things which have their own proper words to describe them. *Held*, that in the passage, "except a reasonable sum for loading, unloading, and covering, and the delivery and collection of goods, and other services incidental to the business of a carrier," the word "carrier" did not refer to carrage by railway, but the ordinary business of a carrier who collected and delivered goods, and carted from door to door; and that the word incidental did not refer to the terminal services above set out, which are performed by a railway company, but rather to such subsidiary services as would, according to the nature of the carrier's employment, ordinarily attach to it. Upon an application to fix the sums to be paid to the railway company for performing the services (1) of loading and unloading iron rods cut into lengths and rolled round a cylinder two feet or so in diameter, into coils which weighed almost two hundredweight each, and of which fifty or sixty made a load for a truck, it was proved that the senders and receivers of the goods employed their own carts; and their carters put the carts on the side of the truck and assisted in the work of loading and unloading, the company's parties performing the larger share of the work. The Commissioners found that at the costs of the company at the sending station was 4¼*d.* a ton, and at the receiving station 4*d.* a ton, and *held*, that taking this cost with an addition for profit, a reasonable charge for such assistance in loading and unloading respectively was 5*d.* a ton. *Held*, that (5) checking was a service not properly embraced in the term loading, and which should not be reckoned as part of the expense of loading. *Held*, as to the service numbered (4), that as it was proved to be a service only occasionally requiring to be rendered, it ought not to be taken into account in fixing the amount of a general rate, and that only those for whom things have to be done out of the usual course should bear the reasonable charge that may be made for the doing of them. The railway company also carried the above mentioned goods of the applicants at a carted rate at so much a ton, of which 2*s.* was for delivery in Birmingham. The varying distances of the carting district, which had a radius of 1¾ miles, were treated alike as regards the amount of the charge, the railway company having adopted the principle of a fixed uniform charge in concert with the other railway companies having stations at Birmingham. Upon complaint by the applicants that they ought to pay 1*s.*, and 2*s.*, for

TERMINAL SERVICES—*Continued.*

cartage, their works being three quarters of a mile from the station: *Held*, that a uniformity of charge for this service was for the benefit of the public, and that the sum of 2*s.* a ton for delivery in Birmingham was not an unreasonable amount considered as an average charge applicable throughout an area within a radius of 1¾ miles. *Semble*, that under some circumstances the charge made by a railway company for cartage may properly be of a higher amount than the sum they allow as a rebate to their customers who cart for themselves. Kempson *et al. v.* Great Western R. Co., 4 R. & Canal Traffic Cos. 426.

Hop Traffic—Extraordinary Services—Cartage—Costs.—A railway company were authorized by their special act to charge for hops a rate not exceeding a stated sum per ton per mile, being "the maximum rate of charge, including the tolls for the use of the railway and branches, and of carriage, and for locomotive power, and any other expenses incidental to such conveyance, except a reasonable charge for loading and unloading goods, when such service is performed by the company. The railroad company's actual charge was considerably more than the mileage rate came to, and the excess was alleged to be the company's charge for delivery and cartage in London, and for (1) loading and assistance in and supervision of loading; (2) unloading; (3) weighing, checking, clerkage and watching; (4) sheeting; (5) use of siding and station accommodation. The services (3), (4) and (5) were services for which they claimed to be authorized to charge either generally or as part of the expense of loading and unloading. Upon an application to the Railway Commissioners under sec. 15 of the Regulation of Railways Act, 1873, to decide what were reasonable sums, if any, to be charged for terminal services performed by the railway company in respect of the applicant's hops, the Commissioners fixed the sums to be paid respectively for cartage and delivery of the hops, and for loading and unloading, but held that the terms loading and unloading did not comprehend more than the labor of packing and unpacking a goods train or a goods truck, whether done by hand or by machinery, and that (3) weighing, checking, clerkage and watching, (4) sheeting, and (5) use of siding, and station accommodation, were services incidental to conveyance, and were not services for which a charge could be made under the clause above set out. Where it appeared upon an application under sec. 15 of the Regulation of Railways Act, 1873, that the charges made by the railway company exceeded their maximum for conveyance by sums largely greater than the charges which, having regard to their statutory powers, the Commissioners determined to be reasonable, the railway company were ordered to pay the costs of the application. Berry *et al. v.* London etc., R. Co. 4 R. & Canal Traffic Cas. 310.

Private Station—Station Services.—The ordinary station services are, as between the company and their customers, a part of the services *prima facie* included in the contract for conveyance; and no charge can be made for such services in excess of the maximum mileage rate authorized by the company's act, except where the act gives special power to make

TERMINAL SERVICES—*Continued.*

such extra charge; and this, notwithstanding that as between two or more railway companies a deduction of terminal charges in respect of such services would be made at the clearing house in the division of a through rate. Where the total charge made by a company for conveyance does not exceed their maximum mileage rate, and there is nothing on the face of it to show that part of it consists of a separate charge for station services, the company is, as between itself and the public, entitled to attribute the whole charge to conveyance, notwithstanding that they may perform, in addition, station services, for all customers who require them, for which they might have made a separate charge, and therefore, a customer who does not require such services is not entitled, on that account, to any rebate. The applicants, traders, having premises connected by private sidings with the goods station of a railway company, loaded their own goods, and placed the wagons, duly loaded and labelled, in sidings belonging to the railway company; and the only work of a terminal station, which the railway company had to perform before such wagons left their goods station was that of arranging them in proper train order. In the case of goods consigned to such traders, the unloading took place on their own premises, the railway company doing part of the haulage from their goods station to the complainant's premises. The railway company charged uniform mileage rates for all traffic, including that of the complainants: *Held*, that the companies were not bound to disintegrate the rates into mileage and terminal charges, and that the applicants were not entitled to a reduction.

Where a railway company charge uniform rates for all traffic alike to cover receiving, forwarding and delivery, but the necessary inference is that some separate charge for station expenses is included, whether persons using their own stations, though the railway company's station is available at their option, can establish a case of undue prejudice: *Quære.* Howard *v.* Midland R. Co., 3 Nev. & Mac. 253.

Providing Covers—Loading and Unloading—Costs.—The special act of a railway company enacted that it should be lawful for them to demand, in addition to the maximum mileage rates, a "reasonable sum for loading, unloading, collecting, receiving or delivering, and for providing covers for minerals, goods, articles or animals." *Held*, that the words "providing covers" included not only the supply of sheets, but also the labor of covering wagons with them. Upon an application to the Commissioners to decide what were reasonable sums to be paid to the railway company for terminal services in respect of hay and straw traffic, it was proved that the railway company at the sending station provided a truck and two sheets for covering the load, which amounted to one and a half tons, and that a railway porter assisted the consignor's servant in loading and drawing the sheets over the load and fastening them; that at the receiving station a porter untied the sheets, and then the consignee unloaded the truck and removed the hay or straw, and that if he detained the truck beyond three clear days, he was charged for demurrage. It was further proved that the railway porter covered the loaded wagon in twenty minutes, and that, with

TERMINAL SERVICES—*Continued.*

the assistance of the consignor's servant, he was able to load also in the same space of time; that the uncovering at the receiving station took ten minutes; but as the unloading was generally spread over two or three days, and the uncovering and recovering the load had to be repeated, another ten minutes should be added on that account. *Held*, that 9*d.* a sheet was a resonable sum for providing covering, assuming that a sheet used in that traffic would not make more than one journey a week; that a reasonable charge for covering the loaded wagon was 2*d.* a ton; for assistance in loading, 2*d.* a ton; for uncovering and recovering the load at the receiving station, 2*d.* per ton. The amount of time a railway company ought to allow a consignee to unload and remove a consignment depends upon the varying circumstances of each particular case. *Semble*, that forty-eight hours after a consignee receives notice of the arrival of his goods is a reasonable time on the average. A charge for the use and detention of wagons, caused by exceeding the time allowed by a railway company to unload in, should not (except where the permission to occupy an extra time in unloading forms part of the original contract) be included in the rate for conveyance. An applicant under sec. 15 the Regulation of Railways Act, 1873, is required by No. 10 of the Commissioners' General Orders to state in his application the actual amount of the terminal charges complained of, and the amount which he contends they ought to be, for the purpose partly of enabling the Commissioners to determine the reasonable incidence of the costs in a case where the decision is intermediate between the contentions of the parties. In a case where the sums decided by the Commissioners to be reasonable to be charged for terminal services, were much in excess of the offer of the applicant, and far below the contention of the railway company, the Commissioners made no order as to costs. Coxon *v.* Northeastern R. Co., 4 Ry. & Canal Traffic Cas. 284.

Receiving—Loading—Unloading and Delivery of Goods.—A railway company were required, by their special act, to carry as common carriers for hire and to afford to all persons conveying or sending goods upon their railway every reasonable convenience and facility for loading and unloading goods. The act also authorized the company for carriage of goods to demand a toll not exceeding three pence per ton per mile. *Held*, that the company were not entitled to charge an additional sum for services performed, accommodation afforded, and expense and risk incurred in and about the receiving, loading, unloading, and delivering the goods. Peyler *v.* Monmouthshire R. Co., 6 H. & N. 644.

Terminals.—The B. line was worked by the S. D. company as agents for the B. company, all traffic on the B. line being charged for at local rates which were fixed by the B. company. The S. D. company refused to credit the B. company with any allowance for terminal charges in respect of traffic arising at B. passing on to their own line or those of other companies. *Held*, that the B. company were entitled to such allowance. Certain companies had agreed to allow the S. D. company a special terminal of 8*s.* a ton for

TERMINAL SERVICES—*Continued.*

fish. *Held*, that the B. company were only entitled to the ordinary clearing-house terminal of 1*s.* 8*d.* for fish. Torbay & Brixham R. Co. *v.* S. Devon R. Co., 2 Nev. & Mac. 391; Dunkirk Colliery Co. *v.* Manchester, Sheffield & Lincolnshire R. Co., 2 Nev, & Mac. 402; Diphwys Casson Slate *v.* Festiniog R. Co., 2 Ib. 73; Manchester, etc., & Trent, etc., R. Cos. *v.* Guardians of Caistor & Glandford Brigg Union, 2 Ib. 53.

Use of Sidings—Shunting.—A railway company are not entitled to charge for the mere use of sidings in shunting or in unloading, so long as there is no delay in unloading. Chatterly Iron Co. *v.* North Staffordshire R. Co., 3 Nev. & Mac. 238.

Collection of traffic from sidings. See Watkins on Wrexham, etc., R. Co., 3 Nev. & Mac. 5.

TERMINUS.—See Foreman *v.* G. E. R. Co., 2 Nev. & Mac. 202.

THIRD CLASS RETURN TICKETS.—See Caterham R. Co. *v.* Brighton & Southeastern R. Cos., 1 Nev. & Mac. 32.

THROUGH BOOKING.—See Central Wales, etc., R. Co. *v.* London, etc, R. Co., 4 R. & Canal Traffic Cas. 101.

A railway company received goods for conveyance from places on the railway of another company. There was through communication between such places by a continuous railway. The sending company refused to book such goods through to their destination and only invoiced them locally to the end of their railway, where they were rebooked to the stations on the forwarding company's line, to which they were directed to be delivered. *Held*, that the sending company must allow through booking from their stations to stations on the forwarding company's line; that through booking was a facility which railway companies may reasonably be required to afford, and as exhibiting the total charge made for conveyance from end to end, was especially of use where doubts existed whether companies were making unequal or excessive charges. Uckfield Local Board *v.* London, Brighton & S. E. R. Cos., 2 Nev. & Mac. 214.

It is not necessary in order to establish a claim to through booking that the service should be continuous by the same trains, or by a connection between trains. Innes *v.* London, Brighton and London & S. W. R. Cos., 2 Nev. & Mac. 155.

THROUGH FARES.—See City of Dublin Steam Packet Co. *v.* London & N. W. R. Co., 4 R. & Canal Traffic Cas. 10; Caledonian R. Co. *v.* Greenock, etc., R. Co., Ib. 70.

THROUGH RATES.—See Warwick, etc., Canal *v.* Birmingham Canal Co. & London, etc., R. Co., 3 Nev. & Mac. 324; Newry, etc., R. Co. *v.* Great Northern (of Ireland) R. Co., Ib. 28.

Agreement, Construction of.—The Solway Junction Co. and the Mayport & Carlisle Co. agreed to afford various mutual facilities. The first four clauses of the agreement provided that various facilities, including through rates, should be given to all through and interchanged traffic whatever passing between the places mentioned in those clauses. The fifth and sixth clauses were as follows:

THROUGH RATES—*Continued.*

"5. All through traffic to or from places on the Furness, the late Whitehaven and Furness Junction, the late Whitehaven Junction, the Whitehaven, Cleator, and Egremont, and the late Cockermouth and Workington Railways respectively, from or to places on the Newcastle and Carlisle Railway, and from or to Carlisle or places north of Carlisle within the district bounded on the west by the Caledonian Railway south of Kirtle Bridge, and on the north by a line drawn due east from Kirtle Bridge, shall, unless otherwise consigned, be sent via the Mayport and Carlisle Railway as at present."

"6. The following regulations shall have effect with respect to the through fares, and rates and the charges to be taken by the two companies respectively, for all through traffic and all traffic interchanged between the two companies (that is to say): (A) The tolls, rates, fares, and charges to be taken for all through traffic, and for all traffic interchanged between the two companies, shall be fixed and determined by mutual agreement, so far as the two companies are concerned, or in case of difference shall from time to time be determined by arbitration, etc."

Upon complaint by the Solway Co. that the Mayport Co. refused to grant a through rate for through traffic which was sent between pairs of places which were not mentioned in the first four clauses of the agreement, it was contended on behalf of the Mayport Co. that clause 6 of the agreement did not, *per se*, confer on either company any right to demand a through rate, but only regulated the manner in which the through rates —the right to which was given by the previous clauses—were to be fixed and divided between the companies. *Held*, that clause 6 of the agreement included all traffic whatever passing off the line of one company onto that of the other. The expression "The Newcastle and Carlisle Railway," as used in clause 5 of the agreement, held to include branches or extensions of that railway north or south of it. Through rates for coke fixed under the agreement. Solway Junction R. Co. *v.* Mayport & Carlisle R. Co., 3 Nev. & Mac. 264.

Alternate Routes.—A route is not unreasonable within the meaning of the 11th section of the Regulation of Railways Act, 1873, because the delivering company propose to hand over to the forwarding company long-distance competitive traffic at a junction but a few miles distant from its destination on the forwarding company's line, nor (where the delivering company's route between the two junctions is the shorter) because the forwarding company could receive the traffic at another junction, further distant from its destination, and forward it thence by their own route. The Railway Commissioners, in apportioning a through rate will take into consideration exceptional expenditure by the terminal company upon works for facilitating the delivery of traffic. On an application for through rates for traffic carried from places in England via Carlisle to stations of the N. B. Co. three or four miles by their railway beyond Whifflet Junction, it appeared that from Carlisle to Whifflet there were two railways, one 93 miles long, part of the C. system; the other 130 miles, part of the N. B. system; and the route for which the through rates were

THROUGH RATES—*Continued.*

sought was for English traffic via the C. Railway between Carlisle and Whifflet to the above-mentioned stations on the N. B. Railway beyond Whifflet, the portion between Carlisle and Whifflet being the railway of the C. Co. The N. B. Co. objected that such route was not a reasonable one for English competitive traffic, and contended that as the traffic was destined for their stations, they were entitled to have the working of it from Carlisle forward. The through rates and route proposed by the C. Co. combined the more direct route of one company with the more convenient station of the other, and fixed as the rates of traffic sent that way the rates in force for through carriage by the alternative but less convenient route. Caledonian R. Co. *v.* North British R. Co., 3 Nev. & Mac. 403.

Alternate Routes—Diversion of Traffic—Reasonable Facilities—Delay.—There were two routes between C. and C. A., the N. W. route and G. W. route. The G. W. Co. having in their own hands, at the outset, traffic consigned by the N. W. route to and from places beyond C. and C. A., sometimes diverted such traffic and carried it by their own route, and at other times caused undue delay in the delivery thereof at C. Upon the application of a company owning a line terminating at C., which formed a part of the N. W. route, the Commissioners granted an order enjoining the G. W. Co. to afford to the applicants all the facilities to which they were entitled under the Railway and Canal Traffic Act, 1854. The right to apply for through rates under section 11 of the Regulation of Railways Act, 1873, is not confined to the companies owning lines at the two ends of the through route, but extends to an intermediate company. *Held*, however, that an intermediate company whose traffic was worked by one of the terminal companies, and who had agreed that the rates for through traffic should be fixed by the latter, were not the proper parties to apply. Whether, when the company have no rolling stock of their own but their traffic is carried by another company, they are entitled to apply under the above section, *quære.* Central Wales & Carmarthen Junction R. Co. *v.* G. W. R. Co., 2 Nev. & Mac. 191.

Alternative Route.—On an application by the C. W. R. Co. for through rates for traffic carried between Haverfordwest and Chester, Liverpool, Manchester, and Leeds, Burton, Birmingham, and Wolverhampton, required to be forwarded via the C. W. route, it appeared that that route was shorter and more direct than the G. W. route via Hereford (on which through rates were in force); the saving of distance by the C. W. route from Chester, Liverpool, Manchester, and Leeds being 57 miles; from Burton, 32 miles, from Wolverhampton, 22, and Birmingham, 7. The G. W. Co. contended that the proposed rates were not in the public interest, because the quantity of traffic to which they could apply was small; because no time would be saved if the traffic were carried by the proposed route; and that the number of exchanges on the proposed through route worked by other companies was great. *Held*, that these were not reasons for refusing through rates any more than they would be for withholding facilities under section 2 of the Railway and Canal Traffic Act, 1854.

THROUGH RATES—*Continued.*

That through rates exist by an alternative route, and that to maintain competition by the proposed route a similar facility is necessary, is a reason for granting through rates. That the distance between the points of arrival and departure of two through routes is the same, is too vague a ground for deciding that the rates charged in respect of these routes should be the same. Central Wales, etc., R. Co. *v.* London & N. W. R. Co. *et al.*, 4 Ry. & Canal Traffic Cas. 211.

Alternative Route—Where a Facility is in the Interests of the Public.—A route for which through rates was proposed that would be a reasonable and serviceable route if worked throughout by one railway company, does not lose its serviceableness because two or more companies are concerned in working it; for the Railway and Canal Traffic Act, 1854, section 2, is intended to secure that in the case of a continuous line formed out of the railways of different companies, the companies should co-operate for the transit of through traffic, and send it forward to its destination as though it were their own proper traffic. The S. & M. Railway formed an alternative route between certain stations on the G. W. Railway and other stations on the S. W. Railway. Upon an application by the S. & M. R. Co. for through rates between such stations via their railway, the rates to be the same as the existing rates between such stations by the alternative route, which were agreed through rates, it was proved that the route proposed by the S. & M. Railway would affect a great saving in time and distance, and that the transfers at junctions were the same by either route. The Commissioners allowed the through rates and route as proposed, on the ground that the interests of the public were, under the circumstances, in favor of the existence of an alternative railway route at equal rates. The Commissioners held that rates that excluded traffic from the shorter of these two through routes, and confined it to the longer, could not but be at the expense of public policy; and though the quantity of traffic might be insignificant, and equal rates might not have much effect in developing through traffic by the route in question, it was a principle of importance to the public that a route between places offering the best opportunities for railway carriage, as far as distance was concerned, should not be placed at a disadvantage merely because portions of the route belonged to companies which had an alternative route and made lower charges in favor of the latter. It would be an undue preference if a company as to traffic of the same description going between the same places worked it at through rates if the traffic passed off their line at one point, and refused that facility if it passed off their line at another point. Swindon, etc., R. Co. *v.* Great Western R. Co. *et al.*, 4 Ry. & Canal Traffic Cas. 349.

Apportionment of Share of Owning Company—Working Agreement—Land and Sea Routes.—The G. Railway and the C. R. joined each other, and, together with steamboats, formed a continuous communication between the stations on the railways and (by a short sea voyage) places on the Clyde. The G. Railway was worked by the C. R. Co., and through rates were divided between the railway companies (after deducting the steamboat fares):

THROUGH RATES—*Continued.*

the rates for the G. Railway were fixed by a joint committee, or, on their differing equally in opinion, by an arbitrator, but the amount of the through rates was fixed, quoted, and (in the first instance) received by the C. R. Co. The committee having been equally divided in opinion as to the rate for the G. Railway, the same was ascertained by an arbitrator, and the G. Co., by his award, were to be paid certain sums in respect of the then existing through rates. These rates, afterwards in many instances, being made higher by the C. Co. for the land route, and lower by the steamboat companies for the sea route, the G. Co. claimed from the C. Co. a share of the increase, alleging that it ought to be in the same proportion for them as the arbitrator had made their rate when the land rates were lower and the sea rates higher; and on their refusal, and the committee being equally divided in opinion, applied to the Railway Commissioners as arbitrators in the matter. *Held*, by the Commissioners, that they had no power to give to the G. Co. any share of the existing through rate made by the company or to take from the C. Co. that portion of the through rate which they had made for themselves, namely, the surplus of the land rate after deducting the amount fixed by the arbitrator for the G. Co.; but that the amount given up by the steamboat companies, and not made part of the land rate by the C. Co., although received and appropriated by them (the rate to the public remaining the same as before the rebate by the steamboat companies), should be divided between the G. and C. Cos. Greenock & Wemyss Bay R. Co. *v.* Caledonian R. Co., 2 Nev. & Mac. 136.

Apportionment of.—The Commissioners will not grant through rates which will have the effect of raising a long-established rate and unsettling interests which have been founded on its continuing, unless the railway company asking for such through rates can show that an alteration is required to give them a fair return upon the traffic carried. One of the objects of sec. 11 of the Regulation of Railways Act, 1873, is to prevent rates being raised merely as a consequence of amalgamation, so far as that can be done by regulating the charges on through traffic, and to cause railway companies to adjust their rates with reference not alone to their own interests, but to the interest of other companies as well. Great Northern R. Co. *v.* Belfast Central R. Co., 3 Nev. & Mac. 411.

Coal Traffic.—A coal rate will be a sufficiently paying rate to be allowed if the earnings per truck are not less than the earnings in any other trucks of a goods train; and if the company's profit on coal is not less than their profit on their goods traffic generally. The delay in unloading wagons at a particular station is not a cost which ought to make the through rate to that station higher. In applications under sec. 11 of the Regulation of Railways Act, 1873, there is no *prima-facie* case in favor of specially low charges, and the onus is upon the company applying to show reasons why the forwarding company should carry for less than it would be likely to receive out of agreed through rates. To induce the Railway Commissioners to impose a through rate, there must be evidence that it is required in

THROUGH RATES—*Continued.*

the public interest. Belfast Central R. Co. *v.* Great Northern R. Co., *et al.* 4 R. & Canal Traffic Cas. 159.

Coal Traffic.—On an application by the Belfast Central R. Co. to fix through rates for coal sent from Belfast quay over their railway to stations beyond Armagh on the Great Northern (Ireland) company's railway, the Commissioners *held*, that having fixed the through rate to Armagh at 3*s.* 6*d.*, every member of the public had a vested right to have his coal carried to that point for that sum, and therefore, in the case of places lying beyond Armagh, the question whether any proposed through rates were or were not reasonable in the interests of the public depended upon whether the difference between the proposed rate of 3*s.* 6*d.* afforded a reasonable remuneration for the haulage for the extra distance, it being proved that the extra distance involved no expense to the Great Northern Co. other than haulage. Belfast Central R. Co. *v.* Great Northern R. Co. (Ireland), 3 Nev. & Mac. 419.

Construction of Statute—Running Trains in Conjunction.—It was provided by statute that C. R. Co. should, for the accommodation of certain traffic, run and carry forward between L. and P. a train in conjunction with every train that should be run by the E. C. Cos., for the accommodation of that traffic between L. and places on their lines, the speed and places of stoppage of such train to be regulated by the E. C. Cos. *Held*, the E. C. Cos. could enforce an alteration in the service of trains run in conjunction by the C. Co. without the consent of the latter, but were not entitled so fix the times of arrival and departure of such trains. The meaning of the expression "run in conjunction" considered. Caledonian R. Co. *v.* G. N. E. & N. British R. Cos., 2 Nev. & Mac. 377.

Owner's Wagons.—Where through rates are in existence for traffic conveyed in company's wagons, a railway company may apply to the Commissioners, under sec. 11 of the Regulation of Railways Act, 1873, to allow different proposed through rates for similar traffic when conveyed in owner's wagons. The jurisdiction of the Commissioners under the above section is simply to decide whether the proposed through rate shall be allowed or refused. Newry, etc., R. Co. *v.* Great Northern (of Ireland) R. Co., 3 Nev. & Mac. 28.

Right of Intermediate Railway Company to apply for in respect of Traffic to and from Termini off their own line—"Forwarding Company"—"Through Traffic"—Due and Reasonable Facility—Costs in Through Rate Cases.—The C. W. R. Co. applied to the Commissioners for an order, under sec. 11 of the Regulation of Railways Act, 1873, allowing through rates in respect of the traffic in certain goods between Chester and Haverfordwest, the route proposed being from Chester over the lines owned and worked by the L. & N. W. R. Co., and over the applicants' own line, which was worked by the same company, under an agreement with the applicants, and thence to Haverfordwest over the G. W. R. Co.'s line, which was worked and owned exclusively by that company, and *vice versa* from Haverfordwest to Chester. The through rate proposed consequently

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commenced and terminated off the line of the company proposing the through rate. The applicants had no rolling-stock, and did not work their railway, but maintained and managed their line, and collected, forwarded, and delivered their own traffic, the whole of the staff at their stations being employed and paid by them, and subject to their orders. *Held*, by the Queen's Bench Division (affirming the judgment of the Railway Commissioners, and in accordance with the judgment of the Court of Sessions in the Greenock and Wemyss Bay R. Co. *v.* The Caledonian R. Co.), that the traffic required to be forwarded was "through traffic to or from" the applicants' railway, and that the applicants were a railway company entitled to apply for a through rate in respect of such traffic within the meaning of sec. 11. Upon an application for a through route and rate, it was proved that the proposed route was fifty-six miles shorter than the route over which the traffic was being carried, and was worked not less conveniently as regards the railway companies by whom the traffic was handled before it got to its destination; and that the proposed rate was of less amount, and presumably, therefore, more beneficial to the public, while at the same time, being more in proportion to the distance than the rate by the other route, it yielded a larger sum per mile to the companies carrying, and was, therefore, not obviously unreasonable as against them. The Commissioners inferred from those facts that the route was a reasonable one, and that the public were interested in the rate being granted; and *held*, that where a good *prima-facie* case of public interest existed on general considerations, it was not necessary to bring evidence to prove a special case as well. In a new through-rate case it is not the practice of the Commissioners to give costs, the defendants having a right, under the Regulation of Railways Act, 1873, to the judgment of the Commissioners before a through rate is put into operation. Central Wales, etc., R. Co. *et al. v.* Great Western R. Co. *et al.*, 4 R. & Canal Traffic Cas. 110.

Sea Traffic—Construction of—Right to Compel a Reference to the Commissioners in lieu of Arbitration—Regulation of Railways Act, 1873, *S.* 8. —Sec. 11 of the Regulation of Railways Act, 1873, enacts (*inter alia*) that, "where a railway company use, maintain or work, or are party to an arrangement for using, maintaining, or working steam vessels for the purpose of carrying on communication between any towns or ports, the provisions of this section shall extend to such steam vessels and to the traffic carried thereby." Upon objection that this clause only applies where the arrangement as to the steam vessel was made by the company to whom the railway with which the steam vessels directly communicated belonged: *Held*, that such clause extended the whole provisions of sec. 11, and took effect whenever there was an arrangement with the proprietors of steam vessels for the conveyance of passengers or goods to and from any port or town with which there was railway communication, provided the railway company party to the arrangement owned or worked, or was otherwise immediately interested in, some portion or other of the

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line of railway communication. Caledonian R. Co. *et al. v.* Greenock, etc., R. Co. *et al.*, 4 R. & Canal Traffic Cas. 135.

Sea Traffic.—The company requiring traffic to be forwarded at through rates under the 11th section of the Regulation of Railways Act, 1873, need not themselves be a forwarding company as regards the particular traffic, but it is enough if they are interested in the forwarding. A railway companay applying for through rates had agreed with C. for the carriage of passengers by steamer in connection with their line. *Held*, that such steamer and the traffic carried thereby were within the provisions of the 11th section. The W. B. R. Co. had entered into an agreement with the C. Co. whereby the latter company worked their line, and it was agreed that the rates and fares to be charged on the W. B. Railway should be fixed by a joint committee of the two companies. *Held*, that this agreement did not relate to through rates, and that the W. B. Co. were the proper parties to apply for such rates under that section. Greenock & Wemyss Bay R. Co. *v.* Caledonian R. Co., 2 Nev. & Mac. 227; Greenop *v.* S. E. R. Co., 2 Ib. 319.

Special Agreement—Shorter Route—Mineral Traffic—Guaranty of large Quantities.—Iron ore was sent from B. to South Wales, by alternative routes, one of which was by the N. W. Railway to Smethwick, and the other by the E. Railway to Strafford, the continuation in each case being by the G. W. Railway. The G. W. company refused to agree to a lower through rate between B. and South Wales by the Strafford route than that charged by the Semthwick, although the distance by the former was twenty miles shorter; the G. W. mileage being practically equal in both cases. Upon an application to the Commissioners by the E. company to allow the proposed through rates, which gave the G. W. company about ½*d.* per ton per mile: *Held*, that the apprehension of the G. W. company that a reduction of rates by the shorter route would entail a similar reduction of the rates by the longer route, and so render the traffic carried by the latter unprofitable, did not justify them in raising the rates by the shorter route above their natural and proper level; and as the G. W. company carried the like traffic under similar circumstances for about ½*d.* per ton per mile, the court allowed the rates proposed by the E. company on condition that the latter company should maintain a traffic by their route averaging 500 tons a week. E. & W. Junction R. Co. *v.* Great Western R. Co., 2 Nev. & Mac. 147.

Through Fares—Arrangements for Using Steam Vessels—Parties to such Arrangements.—To constitute an arrangement for "using" steam vessels within the meaning of section 11 of the Regulation of Railways Act, 1873, the agreement between the railway company and the owner of the steamboat must be definite, and contain an obligation on the part of the steamboat proprietor to ply between the specified ports. Where there was no such stipulation, and where stipulations as to the time of arrival and departure of the boat, and to insure that the railway and steamer should form together part of a continuous line of communication, were

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not contained in the agreement, the agreement was held to be not such an one as was contemplated by the section. Where there was an agreement for the season that a certain steamer should connect with one up and one down train of the railway company daily, the application being made within five weeks of the end of the season, the through rates were refused, on the ground that they would be too transient to be proper to be allowed. When the validity of an agreement is disputed upon grounds not obviously frivolous, the Commissioners will abstain from exercising their power of granting through rates, although the agreement, if valid, is such an one as would have entitled a railway company to require through rates under the section. Caledonian R. Co. *v.* Greenock & W. R. Co., 4 R. & Canal Traffic Cas. 70.

Through Passenger Rates—Steamboat Traffic.—An application by the D. Steam Packet Co. for through rates for passengers between Kingston and London, via the company's steamers and N. W. company's railway, was refused on the ground that the D. Steam Packet Co. had agreed (under statutory powers) that the charges for the conveyance of passenger traffic between London and Kingston were to be fixed from time to time, as regards the through rates, by the railway company. City of Dublin Steam Packet Co. *v.* London & N. W. R. Co., 4 R. & Canal Traffic Cas. 10.

Through Routes—Reasonable Route.—A sending company having two alternative routes for through traffic, one eight miles longer than the other, proposed for the purpose of a through rate, to carry by the longer one, at a double cost and labor in working and maintaining the junction, with the object of making their own mileage more, and the mileage of the forwarding company less: *Held*, that such longer route was not a reasonable route, within the meaning of section 11, sub-section 5, of the Regulation of Railways Act, 1873. A "route" within the meaning of this section, is a route from the station on the sending line where the traffic arises to the station on the forwarding line where such traffic is delivered. East & West Junction R. Co. *v.* Great Western R. Co., 1 Nev. & Mac. 331.

Through Tolls—Canal Traffic.—In a statute granting a gross toll to the Birmingham Canal Co., it was recited that it would be of public advantage for the canal from Warwick to Birmingham to be opened into the Digbeth Branch; and that in order to induce the Birmingham to agree to such junction taking place, it had been proposed and agreed that the Birmingham Co. should have the rates or dues thereinafter mentioned. Both these statutes were repealed by others, substituting fresh tolls: *Held*, that the particular circumstances which led to the original establishment of the tolls did not prevent them coming under the jurisdiction of the Commissioners in fixing through tolls under the Regulation of Railways Act, 1873, sec. 11. The 11th section of the Regulation of Railways Act, 1873, applies not only to mileage tolls and tolls granted as maximum tolls, but also to gross tolls, and any special charges which a company may be entitled to make. In applying for a through rate it is not necessary to complain of an infringement of the Regulation of Railways Act,

THROUGH RATES—*Continued.*

1873. The Commissioners have power to grant a through toll without annexing to it a through rate. The word "toll" in the 11th section of the Regulation of Railways Act, 1873, includes the tolls which are levied for the use of a canal. A company may be a forwarding company within the meaning of the above section, without acting as the carriers of the traffic they forward. Whether each company collects its own *quota* of a through toll, or one collects for all, the character of a through toll is the same; and if made compulsory under the Regulation of Railways Act, 1873, is not subject to the equality clause of the special acts of the railway companies, so as to render it necessary to regulate the local tolls thereby. The 11th section authorizes the Commissioners to allot to a company, out of a through rate, an amount less than its maximum charges, but not less per mile "than the mileage rates which such company may, for the time being, legally be charging for like traffic carried by a like mode of transit on any other line of communication between the same points, being the points of arrival and departure of the through route:" *Held*, that the "mileage rates" must be mileage rates for a line having the same termini as the through route, and must be charged in respect of goods carried over it for its whole length.

A canal company had a dividend on their capital guaranteed to them by a railway company under a statute which provided that they should not reduce or vary their tolls without the consent of the railway company: *Held*, by the Exchequer Division, that the consent of the railway company to the granting of a through toll reducing the tolls of the canal company was required before the Commissioners could make an order under section 11 of the Regulation of Railways Act, 1873. Warwick & Birmingham Canal Co. *v.* Birmingham Canal Co. and others, 3 Nev. & Mac. 113, 324.

By a statutory agreement between the A. R. Co. and the B. R. Co., whose railways formed a continuous line of railway, it was provided that the B. Co. should work the line of the A. Co. in perpetuity, and provide the necessary rolling stock; that the B. Co. should appoint, pay and have the exclusive control over the stuff required for working the A. Co.'s line, and that the A. Co. should appoint, pay and have exclusive control over the officials required to manage and direct the directorial and financial departments of their undertakings, and the men required for the maintenance of the permanent way of their line; that the B. Co. should receive for working the traffic 50 per cent of the gross receipts, and that out of the remaining 50 per cent, the A. Co. should pay, (1) The cost of maintaining the permanent way, public and parochial burdens, and government duties; (2) The "general charges" for the directorial and financial business of the company; and (3) Out of the balance should pay one quarter to the B. Co. in respect of a contribution of 30,000*l.* to the capital holders in the A. Co.; and lastly, that the traffic should be managed, and the rates and fares fixed, by a joint committee, the B. Co. being, however, the sole judges of the proper times for starting the trains: *Held*, by the Court of Session (affirming the judgment of the Railway Commissioners) that the

THROUGH RATES—*Continued.*

A. Co. was, within the meaning of the Regulation of Railways Act, 1873, a forwarding company, and entitled, under sec. 11, to require that through rates should be fixed for traffic passing to and from stations on its line, and to stations on the B. Co.'s own line. Greenock, etc., R. Co. *v.* Caledonian R. Co., 3 Nev. & Mac. 145.

The Commissioners refused to fix and apportion through rates, on the ground that the proposed rates were not in accordance with the terms of a statutory agreement, made between the two railway companies over whose railways the rates were sought to be charged. North Monklands R. Co. *v.* North British R. Co., 3 Nev. & Mac. 382.

"Use" of a Steam Vessel—Undue Prejudice in Cases of Through Rates by Sea—Harbor Board—Application of, for Through Rate.—The granting of through rates to steamboat owners at other ports, and the refusal of such rates to a steamboat owner at a particular port, is not an undue preference of which either the steamboat owner or the harbor board at the latter port can complain under sec. 2 of the Railway & Canal Traffic Act, 1854. A harbor board cannot apply for through rates under sec. 11 of the Regulation of Railways Act, 1873. The existence of through bookings between A. and B., for the carrying of traffic by a certain steam vessel for the seaport of the through journey between these places is not such an arrangement for the "use" of these vessels as to make sec. 11 apply to them, and to enable the owners to require a through rate between A. and C. under that section. *Semble*, a railway company cannot make a distinction in its rates for the same railway journey, according as the traffic is booked no further than it goes by railway, or is booked to a destination beyond the limits, within which the Traffic Act is applicable, *e.g.*, to places across the sea, where sec. 2 of the act has not been extended to the carriage by water. Ayr Harbor Trustees *et al. v.* Glasgow, etc., R. Co. *et al.*, 4 R. & Canal Traffic Cases, 81.

THROUGH ROUTES.—See Victoria Colliery Co. *v.* Midland, etc., R., Co., 3 Nev. & Mac. 35. James and others *v.* Taff Vale, etc., R. Co., Ib. 540; Caledonian R. Co. *v.* North British R. Co., Ib. 403.

THROUGH TRAFFIC.—*Passenger Traffic—Continuous Line of Railway.*—Two railway companies ran trains to T. W., and each had a station there. The stations were a mile apart from each other, but were connected by a line of railway which was used for the transit of goods only. The two railway systems were intended by the legislature to join at T. W. Upon complaint by the inhabitants of the district that no passengers were conveyed on the railway between the two stations, although there was a continuous line of railway: *Held*, that the case came within sec. 2 of the Railway and Canal Traffic Act, 1854, and accordingly an order was made enjoining both the companies to afford a continuous communication for passengers as well as for goods by means of their continuous lines. Uckfield Local Board *v.* London, Brighton & S. E. R. Cos., 2 Nev. & Mac. 214.

The defendants carried goods from London to the Isle of Wight by their own railway from London to Southampton, and thence by tramway and

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steamer. The plaintiffs were also in the habit of carrying goods from London to the Isle of Wight, using the defendants' line from London to Southampton, and thence conveying them by carts and steamer. The plaintiffs claimed to have their goods carried by the defendants from London to Southampton at a sum equivalent to the defendants' through charge from London to the Isle of Wight, less a fair charge for collection in London and for carrying from Southampton station to the Isle of Wight. *Held*, that they were not entitled to this, the delivery by the defendants beyond the limits of their line not being a delivery auxiliary or subsidiary to their business as carriers on their own line, but to their general business as common carriers, and therefore differing from a delivery in the immediate neighborhood of a station. Baxendale *v.* Southwestern R. Co. 35 L. J. Exch. 108.

The Wemyss Bay line commences at a point on the Caledonian line near Port Glasgow and terminates at Wemyss Bay, and is worked by the Caledonian Company under an agreement entered into between them and the Wemyss Bay Co. and confirmed by the Greenock and Wemyss Bay R. Act, 1862. *Held*, that on a sound construction of the act and agreement, the powers of a joint committee of the two companies therein provided do not extend to the regulation of the tolls and rates to be charged on through traffic from Glasgow to stations on the Wemyss Bay line, but only to those to be charged on the Wemyss Bay Railway. Greenock & Wemyss Bay R. Co. *v.* Caledonian R. Co., 8 Scottish Law Reporter, 634.

Through Trains—Through Booking.—Upon a complaint that two railway companies have not established a proper through service, *via* a junction for traffic requiring to pass over a portion of each company's railway, and had not availed themselves of the junction for the interchange of passenger and goods traffic, and had not afforded all due and reasonable facilities for the through transmission of all descriptions of traffic between the two companies: *Held*, by the Commissioners under the circumstances of the case, taken in connection with the powers and duties of the companies under their private acts. (1) That the companies must afford to the public, as reasonable facilities, a train service of eight trains daily each way, to connect the two railways as a continuous line; and through booking between the stations on the two railways. (2) But that through carriages need not be provided as long as passengers could exchange from one train to another at the same station. (3) That the companies must interchange goods at the junction. (4) That a railway or canal company cannot charge a higher wharfage rate on goods about to be conveyed by the railway of another company than on goods about to be conveyed on their own railway. The costs of the applicants ordered to be paid by the two companies in equal shares. *Held*, by the Exchequer Division, upon an application by the Chatham Co., for a prohibition restraining the Railway Commissioners from enforcing their order on the defendant railway companies in this case by penalties, that the Commissioners have no power to make an order on two railway companies to act jointly in doing

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what neither company has power to do separately. Toomer *v.* Chatham and Dover and Southeastern R. Cos., 3 Nev. & Mac. 79.

THROUGH TOLLS.—See Warwick and Birmingham Canal Co. *v.* Birmingham Canal Co. and others, 3 Nev. & Mac. 113, 324.

TOLLS.—*Act Providing Tolls for Conveyance from any place within Two Miles of certain point.*—Where by a canal act, a toll of one shilling per ton was imposed upon all coal, etc., conveyed upon any part of the canal from a place (A), or from any place within two miles thereof: *Held*, that this only applied to voyages commencing within those limits, and that no such toll was payable for coal loaded at a place more than two miles from A, although conveyed upon a part of the canal within two miles of A. Brittain *v.* Cromford Canal Co., 3 B. & Ald. 139.

Canal Boats—Tolls on Empty Boats.—A Canal act directed that no boat navigating the canal of less burthen than twenty tons or which should not have a loading of twenty tons on board, should be allowed to pass through any of the locks unless on payment of tonnage equal to a boat of twenty tons. *Held*, that this clause did not impose a toll upon empty boats. Leeds & L. Canal Co. *v.* Hustler, 1 B. & C. 424.

Charges for Receiving, Loading, Unloading, etc.—A railway company were required by their special act to carry as common carriers for hire, and to afford to all persons conveying or sending goods upon their railway every reasonable convenience and facility for loading and unloading goods. The act also authorized the company, for carriage of goods, to demand a toll not exceeding three pence per mile: *Held*, that the company were not entitled to charge an additional sum for services performed, accommodation afforded, and expense and risk incurred in and about the receiving, loading, unloading, and delivering goods. Pegler *v.* Monmouthshire R. & Canal Co., 6 H. & N. 644.

Charges for Stopping—Loading and Unloading as Tolls.—A company obtained an act (8 & 9 Vict. c. clxix) authorizing it to construct a railway, and to demand tolls for the conveyance of passengers and goods thereon. The charge for the conveyance of goods was generally thus expressed (per ton per mile not exceeding), etc. One clause provided that "for articles or persons conveyed on the railway for a less distance than four miles" there might be, "in addition to the prescribed tolls for conveyance," a reasonable charge for the expense of stopping, loading and unloading. No publication of this charge in the form of a "toll" had been made upon the toll-board: *Held*, that this "charge" for stopping was not properly a "toll," and that the non-publication of it on the toll-board in the form required by the Railway Clauses Consolidation Act, 1845, secs. 93 and 95, did not prevent the company from demanding it. The 105th clause granted tolls for "a fraction of a mile beyond four miles," etc.; the company claimed such tolls when the whole distance traversed was less than four miles. The Lord Chancellor (Earl Cairns) and Lord Selborne were of opinion that the charge was, on the whole, warranted by the words of the act, and that the judgment of the court below on this point must be affirmed. Lord Penzance and Lord O'Hagan, applying the

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principle that no charge could be imposed on the public but by the clearly-expressed intention of the legislature, *held*, that in this case the legislature had not clearly expressed an intention, nor had intended to authorize such a charge. Price *v.* Monmouthshire Canal & R. Co., 4 App. Cas. 197; 49 L. J. Ex. 130.

Light and Heavy Goods—Consent to Classification.—A Canal act gave a higher rate of tonnage for light goods than for heavy goods. If a jury find that certain goods were heavy goods when the act passed, ten years subsequent consent of the company to consider the same species as light goods will not entitle the canal company to demand for these the toll on light goods. Staffordshire & W. Canal Nav. Co. *v.* Tren. etc. Nav. Co., 6 Taunt. 151.

Meaning of "Tolls."—The word "tolls" in sec. 95 of the Railway Clauses Consolidation Act, 1845, relates to tolls properly so called, and not to charges for carrying passengers in the company's own carriages. Brow *v.* Great Western R. Co., 9 Q. B. D. (C. A.) 744; 51 L. J. Q. B. D. (App.) 529.

TRADE TICKETS.—See Caledonian R. Co. *v.* N. British R. Co., 2 Nev. & Mac. 271.

ULTRA VIRES.—See *Re* Taff Vale, etc., R. Co., 4 R. & Canal Traffic Cas. 54.

UNLOADING TRUCKS.—See Dunkirk Colliery Co. *v.* Manchester, Sheffield & Lincolnshire R. Co., 2 Nev. & Mac. 402; Thompson *v.* London & N. W. R. Co., 2 Ib. 115; Bell *v.* London & N. W. R. Co., 2 Ib. 185.

UNDUE PREFERENCE—*Canal Tolls—Coal Traffic—Uniform Canal Toll, Irrespective of Distance.*—Upon complaint by the D. Colliery Co. that the toll charged for coal sent from their colliery by canal to K. was greater in proportion to the distance than the toll charged upon coal similarly sent by other colliery proprietors whose collieries were also situated in or near the same canal, but at a distance from K. exceeding by several miles the distance therefrom of the D. Colliery, it appeared that the toll charged on coal to K. from the D. Colliery was 13*d.*, and from the other collieries 13½*d.*, and that the coal traffic on the canal between the D. Colliery and K. was worked with less expense and trouble to the canal owners than the traffic between the other collieries and K.: *Held*, that the D. Colliery Co. were subjected to an undue and unreasonable prejudice and disadvantage by being charged a toll only one half penny less in amount than the toll charged to the other colliery proprietors. Denaby Main Colliery Co. *v.* Manchester, etc., R. Co., 4 R. & Canal Traffic Cas. 28.

Different Districts—Brewers' Traffic.—To a complaint under sec. 2 of the Railway and Canal Traffic Act, 1854, of an inequality of charge, it is no answer that the traffic favored and the traffic prejudiced are not in the same locality or district; and assuming that there is a competition of interests, and that circumstances in other repsects are not dissimilar, the traffic of two localities, both on the same system of railways, although at a distance from each other, is as much within the act as the traffic of two

UNDUE PREFERENCE—*Continued.*

or more individuals in the same locality. (Nicholson *v.* Great Western R. Co., 5 C. B. N. S. 366, followed.)

A railway company carried beer from B. at lower rates than from N., which was forty miles distant from B. Upon complaint by brewers at N. that their traffic was unduly prejudiced by not being carried on as favorable terms as the traffic of brewers from B., competitors in trade with the applicants, it appeared that the railway company charged all brewers at B. a uniform rate of 1½*d.* per ton per mile, station to station, with a minimum of 5*s.*, including loading and unloading, and an abatement off the quoted rates of 9*d.*, per ton for loading and unloading, and 4½*d.* per ton for haulage when the brewers did those services themselves instead of employing the railway company to do them, and that the railway company's charges for brewers' traffic from N. exceeded the charges from B. to the extent of twenty-five to thirty per cent: *Held*, that the lower charges for carrying beer from B. were justified by the special advantages the railway company received in dealing with such traffic as compared with the applicants' traffic. The railway company carried beer in consignments not exceeding 500 lbs. in weight for brewers at B. at the same rate per hundred weight as corresponded to the tonnage rate which they charged such brewers for the carriage of consignments of over 500 lbs. in weight, whereas at N. they had one tariff for consignments over 500 lbs., and another for consignments of 500 lbs. or under in weight; the latter tariff known as the "small-packages rates" being on a higher scale than the tonnage rate the railway company charged at N., and also than their tonnage rates at B.: *Held*, that such rates gave an undue and unreasonable preference or advantage to the brewers at B., over the brewers at N., and that the railway company must frame their scale of charges for the carriage of consignments of beer not exceeding 500 lbs. in weight, upon the same principle at both places as regards the relation of such charges to the tonnage rates obtaining at such places respectively. Where the railway company carried beer sent from B. in cask by their railway to any place thereon where B. brewers had an agency, and such beer was there bottled and afterwards consigned in bottle from such last-mentioned place to any station on their railway, it was carried at the B. special rate, which was lower than that charged by the railway company for the carriage in bottle of beer not brewed in B. between the same places, and also lower than that charged for the carriage of beer in bottles from N.: *Held*, that the brewers at B., or their agents, were unduly and unreasonably preferred over the brewers at N., and that the railway company must carry beer in bottle from N. for brewers there, on equal terms with the terms on which they carried B. brewers' beer in bottle from places other than B. for such brewers or their agents. The railway company carried to B. from other places on their lines of railway for brewers and maltsters at B., malt, hops and barley at lower rates and on more favorable terms than they carried similar traffic to N. for brewers there: *Held*, that the railway company must carry malt, hops and barley to N. for the brewers there on equal

UNDUE PREFERENCE—*Continued.*

terms with the terms on which similar traffic was carried to B. for brewers at that place, having due regard to the circumstances, if any (whether consisting in the routes differing, or in portions of the line passed over being more costly to work, or having been more costly to construct in the one case than the other,) which may render the cost to the railway company of carrying such traffic for the brewers at N. greater than the cost of conveying similar traffic for the brewers at B. Richardson *et al. v.* Midland R. Co., 4 R. & Canal Traffic Cas. 1.

Equal Mileage Rate—Coal Traffic.—A difference in the distance the traffic is carried is not of itself a valid answer to a complaint of undue preference under sec. 2 of the Railway and Canal Traffic Act, 1854, and no conclusive inference is to be drawn either on the one hand from a railway company not carrying at an equal mileage rate, or not making an equal profit per mile, nor, on the other hand, from the rate for the longer distance, though less per mile, amounting to more for the whole distance, or leaving a larger sum as profit after payment of expenses; and in determining the question whether the lower mileage rate is or is not an undue advantage, it is necessary to consider whether either traffic is able to be carried at a less cost to the railway company than the other, or whether either traffic is under different conditions as regards competition of routes or other special circumstances. A railway company carried coal to B. from the N. W. Collieries, an average distance of thirty miles at an average rate of 2*s.* 2*d.* per ton, and from the S. W. Collieries, an average distance of 156 miles, at a uniform rate of 6*s.* per ton. Upon a complaint by the N. W. Colliery owners that the rates charged for their coal to B. were an undue prejudice to that traffic by reason of the lower rate at which S. W. coal was carried: Found, as a matter of fact, that the cost of conveyance to the railway company of coal from S. W. was not proportionately less than from N. W., and that a competition existed between such coal at B. sufficient to lay the foundation for a charge of undue prejudice, provided damage had accrued to the complainants as a consequence of the relative rates complained of; but that there was no evidence of such damage, the complainants not having shown that their output of coal was in excess of the demand, nor that they could not find a market for all their coal at existing rates. *Held*, that the carriage of such N. W and S. W. coal to B. by the railway company at unequal rates per ton per mile was not an undue prejudice to the complainants. Broughton & Plas Power Coal Co., *et al. v.* Great Western R. Co., 4 R. & Canal Traffic Cas. 191.

Equal Mileage Rate.—The plaintiff was one of the registered officers of a company who were proprietors of iron and tin-plate works, situate near the defendants' railway, and twelve miles distant from the seaport of Swansea, on the defendants' railway to Liverpool. The defendants charged the said company 12*s.* 6*d.* per ton for the carriage of iron and tin-plates over their line from the company's works to Liverpool, while other manufacturers of iron and tin-plates, whose works were situate within a radius of six miles of the seaport of Swansea, and further, there-

UNDUE PREFERENCE—*Continued.*

fore, from Liverpool than the plaintiff's works, were charged by the defendants for the carriage of their plates from Swansea to Liverpool, 11*s.* 4*d.* per ton only. There is communication by sea between Swansea and Liverpool, and the rate of 11*s.* 4*d.* was fixed by the defendants as the charge for the carriage of the goods of these manufacturers within the six miles' radius in order to enable the defendants to compete with the sea carriage; and by reason of the lesser charge these manufacturers who were thus favored were enabled to sell their plates at a lower price per ton, proportionate to the difference in the tonnage delivered at Liverpool, than the plaintiff's company. *Held*, that the charging a lower rate to the manufacturers within the six miles' radius for the carriage of their goods a longer distance than the plaintiff's company was an undue and unreasonable preference and advantage granted to them by the defendants, and was in contravention of sec. 2 of the Railway and Canal Traffic Act, 1854, and that the plaintiff was entitled to maintain an action to recover the amounts paid by this company to the defendants in excess of the 11*s.* 4*d.* rate. (Evershed *v.* London & N. W. R. Co., 2 Q. B. D. 254, followed); Budd *v.* London & N. W. R. Co., 4 R. & Canal Traffic Cas. 393.

As to giving an undue preference by allowing through rates by one route, and refusing them by an alternative route. See Swindon, etc., R. Co. *v.* Great Western R. Co. *et al.*, 4 R. & Canal Traffic Cas. 349; Manchester, etc., R. Co. *v.* Denaby Main Colliery Co., Ib. 439; Murray *v.* Glasgow, etc., R. Co. Ib. 456.

Ground of Complaint Removed Before Hearing.—Upon complaint by a trader that a railway company had made excessive charges for the conveyance of his traffic, and unduly preferred the traffic of another trader, it was admitted by the company to be so, but contended by them that, as such causes of complaint had been removed before the application was filed, it was not necessary that an injunction should issue: *Held*, that the applicant was entitled to be fortified for the future with such security as the Railway Commissioners had power to give him, if it was not unreasonable for him not to be content without it, and that injunction must issue. Upon complaint and proof that a railway company had at different times reduced particular rates for traffic from G. to L., but had not given the applicants traffic the benefit of such reductions till long after the authorized dates for their coming into operation, and after the dates when they took effect for similar traffic from other traders in G. carrying on the same business as the applicants: *Held*, that the applicant had been subjected to an undue prejudice and disadvantage in and about the sale and disposal of his goods in competition with the said other traders in G. carrying on a similar business with himself. Macfarland and Co. *v.* North British R. Co., 4 R. & Canal Traffic Cas. 269.

Maltsters' Traffic—Barley and Malt—Amount of Traffic—Average Truck Loads—Back Loads for Trucks—Cost of Goods Station.—A railway company carried to B. from various places on their lines of railway for brewers and maltsters at B. barley and malt at lower rates and on more favor-

UNDUE PREFERENCE—*Continued.*

able terms than they carried similar traffic to D. for maltsters there. Upon complaint by maltsters at D. that their traffic was unduly prejudiced by not being carried on as favorable terms as the traffic of brewers and maltsters at B., competitors in trade with the complainants, it appeared that the charge for barley from stations from which barley was sent to both places averaged to D. 6*s.* 11*d.* per ton, and to B. 5*s.*, or 1*s.* 11*d.* per ton less. The railway company sought to justify this inequality in the rates for the inward grain traffic of the two places on the following grounds, viz.: (1) That the traffic of the two places differed greatly in amount, the total traffic at B. being 600,000 tons per annum, of which 55,000 tons were barley, and that of D. 220,000 tons, of which 6900 tons were barley. (2) That the truck loads conveyed to D. did not weigh as much per truck as to B. The average extra weight of the truck load to B. was from 8 to 10 cwt., and the earnings on the extra weight were claimed to be all clear profit, on the ground that half a ton more of paying load did not increase the cost of hauling the truck. (3) That about 17 per cent of the trucks received loaded with barley at D. could not be reloaded there with any other traffic, and came away empty on the outward journey, whereas loaded wagons into B. were practically certain of a back load. (4) That the cost of the goods station staff was 5*d.* more per ton at D. than at B. *Held*, (1) that a difference of charge could not be sustained on the ground that the aggregate traffic of the one town exceeded that of the other, it having been proved that the B. rates were charged not only to the large brewers and maltsters, but to all inhabitants of the place, however small might be the quantity of their traffic, and that there was nothing exceptional in the natural position of B. to affect the rate at which goods could be carried. (2) That some difference in rates for competitive traffic to B. and D. might be allowed in respect of the average weight of truck loads, and that assuming traffic to D. to pay the same rate per mile as traffic to B., there ought to be an addition made to the D. rate, as for 8 or 10 cwt. more per truck to equalize matters with B. as regards mileage receipts per truck. (3) That some difference in such rates might be allowed in respect of the certainty of back loads from B., and that it was proved that one fifth part of the loaded wagons to D. were in excess of its requirements for outward journeys, a fourth or fifth part of 4*d.* a ton should be added to the D. rate, assuming traffic to D. to pay the same rate per mile as traffic to B. (4) That as barley was not a part of the merchandise handled in the goods station either at B. or at D., the cost of the goods staff was no part of the working charges in carrying it, and that the alleged greater amount of such cost in proportion at D. did not furnish a ground for a higher rate on barley carried to that place, and only using a siding in the goods yard for the same purposes, and to the like extent, as the like traffic at B. used the deposit sidings there. *Held*, therefore, that the railway company must carry barley and malt to D. for maltsters there on terms equally favorable to such maltsters with those on which similar traffic was carried to B. for maltsters at that place, hav-

UNDUE PREFERENCE—*Continued.*

ing due regard to the differences which had been proved to exist in the traffic to the two places respectively in respect of the average weight of truck loads, and of certainty of back loads, and to such other circumstances (if any) as might render the cost to the railway company of carrying such traffic to maltsters at D. greater than the cost of carrying similar traffic for maltsters at B. Girardot, Flinn & Co. *v.* Midland R. Co., 4 R. and Canal Traffic Cas. 291.

Scale of Rates under an Agreement—Short-distance Clause—Charges within.—Where a railway company, having a right, under their special act, to charge for six miles where the traffic was carried for less than six miles, agreed with B for a varying scale of charges for certain traffic for distances between three and six miles (under which they charged *7d.* per ton for a distance of 5 miles 54 chains), and refused to apply the like scale to A's traffic (which they charged *6d.* per ton for a distance of 3 miles 57 chains), and A complained of an undue prejudice, it was *held* by Sir Frederick Peel and Mr. Commissioner Price (Mr. Commissioner Miller dissenting) that the disproportion was not an undue preference having regard to the short-distance clause of the special act, because the applicants had failed to show that any traffic was being carried for B for the same distance as that for A. By agreement A was to be charged "rates and charges for his traffic similar to those which may for the time being be charged to and paid by B under schedules A and B" of a certain agreement between the railway company and B, "and that in the terms of the provisions of the agreement, or any amendment or alteration thereof." The agreement between the railway company and B was that "B shall, subject to the exceptions and provisions hereinafter mentioned, pay" to the railway company the charges mentioned in schedules A and B. It further provided that "notwithstanding what is before written that for and in respect of all limestone, calcined ironstone, hematite, sand, and fireclay passing along the railways formerly belonging to the Androssan R. Co.," to and from the B. works, B should pay the charges specified in schedule D. *Held* by Sir Frederick Peel that A's traffic in hematite and limestone along the Androssan R. was not within schedules A and B. *Held* by Mr. Commissioner Miller and Mr. Commissioner Price that it was similar traffic to that mentioned in schedules A and B, and was chargeable at the rates of those schedules. Merry & Cunninghame *v.* Glasgow, etc., R. Co., 4 R. & Canal Traffic Cas. 383.

Seaports.—The rates charged by railway companies for traffic to ports where such traffic is to be carried from such ports to others, must be relatively to the service equal. Ayr Harbor Trustees *et al. v.* Glasgow, etc., R. Co. *et al.*, 4 R. & Canal Traffic Cas. 90.

Steamboat Traffic.—Steamers were provided and worked for the conveyance of mails and passengers between Holyhead and Kingstown by D. Steamboat Co., under statutory powers and agreements obtained and made between that company and N. W. R. Co. It was agreed that the charges for the conveyance of passenger traffic by such route (called the

UNDUE PREFERENCE—*Continued.*

mail route) between Kingstown and London, etc., should be fixed as regards the through rates by N. W. R. Co. The N. W. R. Co. subsequently established a service of steamers for passengers between Holyhead and the North Wall in Dublin (called the North Wall route). The effect of the statutory agreement between the two companies was to give N. W. R. Co. a complete control over the fares of both routes, as if they were sole owners of both, and therefore the provisions of the Railway and Canal Traffic Act, 1854 (which were made expressly applicable to both those lines of steamers), applied to both routes as if they had been parts of the same system. The N. W. R. Co.'s service of steamers was almost equal to the mail service in point of speed and accommodation, and its fares were much lower; the first and second-class passengers, who were charged 60*s.* and 45*s.* respectively between Euston and Dublin, by the mail route being only charged 47*s.* 6*d.* and 36*s.* 6*d.* by the North Wall route, a difference of 12*s.* 6*d.* and 8*s.* 6*d.* respectively. The services over the distance between Holyhead and Dublin were substantially the same; the mileages (adding the railway from Kingstown to Dublin) were nearly equal; the accommodation by the North Wall route was practically as good as that by the mail route, and the vessels of the two companies were worked at about the same cost. The mail through fares were divided by mileage, and the N. W. R. Co. received for their land portion of the through service 46*s.* 10*d.* out of the first-class fare, and 35*s.* 3*d.* out of the second-class. In both cases they carried the passengers the same distance by railway, but the passengers to and from North Wall travelled in addition by the railway company's steamboat. Their boat fare was 8*s.* first or second class, and they received, therefore, in respect of the North Wall passengers 39*s.* 6*d.* first class, and 28*s.* 6*d.* second class for railway fare from London to Holyhead, as against 46*s.* 10*d.* and 35*s.* 3*d.* for the same railway journey, with only the difference in the class of train, in respect of the mail-route passenger. *Held*, that the amounts by which the fares by the mail route were thus more than those by North Wall route, whether in regard to the fares charged for the entire service to Dublin or the portions due to the land journey only, were excessive and an undue prejudice to the traffic by the former route, and that the circumstances did not justify an excess in the total fares to Dublin by the mail route of more than, at the outside, ten per cent. City of Dublin Steam Packet Co. *v.* London & N. W. R. Co., 4 R. and Canal Traffic Cas. 10.

Undue Prejudice—Subjecting Coal Traffic to Obstructions.—Charges which a railway company have no statutory power to make, and which are intended or calculated to prevent, and do in fact prevent, the conveyance of traffic on the railway, are in violation of sec. 2 of the Railway and Canal Traffic Act, 1854. Young *v.* Gwendraeths Valleys R. Co., 4 R. and Canal Traffic Cas. 247.

Of Company's Agent—Carrier—Amending Rule—Costs.—A railway company possessed a line from B to C, advertised to convey goods from A to C (in conjunction with another company) at the rate of 50*s.* per ton, pro-

UNDUE PREFERENCE—*Continued.*

vided they were consigned by A to their own agents at those respective places; but if consigned through any one else, they charged 2*s.* 6*d.* per ton more. *Held* ground for an injunction under the Railway and Canal Traffic Act, 1854. And the rule was made absolute, with costs, although it prayed a writ, enjoining the company to charge an equal rate for the carriage from A to C, and the writ was granted as from B to C only. *Semble*, that both companies ought to have been brought before the court by the rule. Baxendale *v.* North Devon R. Co., 1 Nev. & Mac. 180.

Of Company's Agent—Carrier—Cartage.—A railway company permitted a carrier (who also acted as superintendent of their goods traffic) to hold himself out as their agent for the receipt of goods to be carried on their line, and his office as the receiving office of the company, and goods were received by him at that place without requiring the senders to sign conditions which the company required all other carriers who brought goods to their station to sign. *Held*, an undue preference, and the subject of an injunction under the Railway and Canal Traffic Act, 1854. Baxendale *v.* Bristol & Exeter R. Co., 1 Nev. & Mac. 229.

Of Company's Agent—Carrier—Use of Station—Way-bill.—A railway company which employed agents for delivering in a large town goods brought by the railway to the parties to whom they were addressed, arranged within the station the goods to be delivered by these agents, and afforded to them other facilities in the use of the station. *Held*, that the company, in refusing to give the same advantages to carriers to whom goods were consigned, were not guilty of a contravention of the provisions of the Railway and Canal Traffic Act. A railway company receiving from another railway company goods addressed by the sender to A. B., Argyle street, Glasgow, is not bound to regard markings by the latter company in the way-bill or invoice as to the carriers to be employed in the delivery. Pickford *v.* Caledonian R. Co., 1 Nev. & Mac. 252. See also Parkinson *v.* Great Western R. Co., Ib. 280.

UNDUE PREFERENCE OF THEMSELVES BY A RAILWAY COMPANY.—See Baxendale *v.* London & Southwestern R. Co., 1 Nev. & Mac. 231; Palmer *v.* London, Brighton & South Coast R. Co., Ib. 271; Baxendale *v.* Great Western R. Co., Ib. 202; Garton *v.* Great Western R. Co., Ib. 214; Wannan *v.* Scottish Central R. Co., Ib. 237.

UNDUE PREJUDICE.—See Aberdeen Lime Co. *v.* Great North of Scotland R. Co., 3 Nev. & Mac. 205; Howard *v.* Midland R. Co., Ib. 253.

UNLOADING TRUCKS.—See Aberdeen Lime Co. *v.* Great North of Scotland R. Co., 3 Nev. & Mac. 205; Locke *v.* Northeastern R. Co., Ib. 44.

UNLOADING TRUCKS.—*Amending Rule.*—A railway company which had been in the habit of unloading goods conveyed by them on their railway, by taking them out of their trucks and placing them in or adjacent to the wagons of the consignees, established a new system, under which they declined to allow their servants to unload the goods of C. from their trucks without extra charge. They, however, continued to unload the goods of P., as these from the smallness of their quantity, were not carried,

UNLOADING TRUCKS—*Continued.*

like the goods of C., in separate trucks, but were mixed with the company's own traffic, and it was therefore for the company's own convenience that they unloaded them from the trucks. The court refused to make absolute a rule for an injunction under the Railway and Canal Traffic Act, 1854, enjoining the company to unload the trucks containing C.'s goods, and to deliver such goods to C. by placing the same in or adjacent to his wagons: *Semble*, that if C. had previously complained to the company of their giving an advantage to P. over him in so unloading P.'s goods, and the company had not afterwards removed such ground of complaint, the court would have interfered to prevent the continuance of such undue advantage, although the rule *nisi* for the injunction was not framed for such a case. Cooper *v.* London & Southwestern R. Co., 1 Nev. & Mac. 185.

USE OF STATION.—See Pickford *v.* Caledonian R. Co. 1 Nev. & Mac. 252.

USE OF TRACKS.—*Location of Station.*—Prior to St. of 1871, c. 343, providing for the establishment of a union passenger station in the city of Worcester for all the railroad corporations whose roads run into and from the city, and for making corresponding changes in their several tracks and locations, the tracks of the Providence & Worcester R. R. Co. ran from the junction station in Worcester upon a location parallel to and adjoining that of the Boston & Albany R. Co., to a point near the new station, and those of the Norwich & Worcester R. Co. crossed the tracks of the Boston & Albany R. Co. at grade, and ran to a station in the heart of the city, but did not cross the tracks of the Providence & Worcester R. Co.; the statute authorized the Providence & Worcester R. Co. to extend its railroad to the new station, and authorized the Norwich & Worcester R. Co. to extend its railroad from the junction station to the new station, and authorized both corporations for such purposes to take such portions of the location of the Boston & Albany R. Co. as the parties might agree, or, in case of disagreement, as the board of Railroad Commissioners might determine. A subsequent section provided that said corporations severally or jointly may purchase or take such lands as are necessary for any and all the purposes aforesaid, or for additional tracks; it further provided that the former road of the Norwich & Worcester R. Co. should be discontinued beyond the junction, and that the junction might be passed by express trains without stopping. From the junction station, the tracks of the Norwich & Worcester R. Co. could be extended to the union station in three ways: 1st, by going between the other two railroads, and taking a portion of the location of each not occupied by the tracks of either, thus obviating a crossing at grade; 2d, by crossing the tracks of the Boston & Albany R. Co. at grade, and running through a populous part of the city; 3d, by twice crossing the tracks of the Providence & Worcester R. Co. Another section of the act directed the construction by the three railroad corporations above mentioned, and by another railroad corporation, of one or more railroad tracks for freight purposes in a

USE OF TRACKS—*Continued.*

certain direction, of which provision the Norwich & Worcester R. Co. could not conveniently, if it could possibly, avail itself, unless it ran between the tracks of the other two railroads. *Held*, that the statute, by necessary implication, gave to the Norwich & Worcester R. Co. the right to take a portion of the location of the Providence & Worcester R. Co., and to extend its road from the junction to the union passenger station in the first of the three methods above stated. Under the St. of 1871, c. 343, providing for the establishment of a union passenger station in the city of Worcester for the use of the several railroad corporations entering the city, authorizing them to extend their tracks to the station, and giving the board of Railroad Commissioners power to order such changes in the location and arrangement of tracks in the vicinity of the station as the safety and convenience of the public might require, the board has the power, in authorizing one railroad corporation to take a portion of the location of another railroad corporation, to do so on condition that the latter shall have the right to use a track of the former, subject to reasonable regulation to be established by the board. Providence & Worcester R. Co. *v.* Norwich & Worcester R. Co., 22 Am. & Eng. R. R. Cas. 493 (138 Mass. 277).

USER OF RAILWAY.—The plaintiffs, a colliery company, having sidings which connected their collieries with a railway, gave notice to the railway company of their desire to run engines and carriages over the railway, pursuant to the provisions of the 92nd section of the Railway Companies Clauses Act, 1845. The railway company declined to give effect to the notice, and obstructed the passage of the plaintiffs' trains over their line. The plaintiffs filed a bill to restrain the railway company from interfering with the use of the railway. *Held*, that although the plaintiffs were entitled, under the above section, to use the railway, the court could not compel the railway company to employ their servants in working the points and signals on the line or to intrust the working of them to the plaintiffs' servants; and since it was impossible for the plaintiffs to exercise their rights without the use of the points and signals, their bill must be dismissed, but without costs. Powell Duffryn Steam Coal Co. *v.* Taff Vale Co., 43 L. J. ch. 575.

WAGONS.—*Supply of, by Railway Company.*—See Watkinson *v.* Wrexham, etc., R. Co., 3 Nev. & Mac. 164. Tharsis Sulphur, etc., Co. *v.* London & Northwestern R. Co., Ib. 455. Aberdeen Lime Co. *v.* Great North of Scotland R. Co., Ib. 205.

Collecting Wagons from Private Siding. See Watkinson *v.* Wrexham, etc., R. Co., 3 Nev. & Mac. 5; Same *v.* Same, Ib. 446.

WAITING-ROOM.—See Southeastern R. Co. *v.* Railway Commissioners, 3 Nev. & Mac. 464.

WAREHOUSE.—See Southeastern R. Co. *v.* Railway Commissioners, 3 Nev. & Mac. 464.

WAY-BILL.—See Pickford *v.* Caledonian R. Co., 1 Nev. & Mac. 252.

WEIGHING COAL.—See Watkinson *v.* Wrexham, etc., R. Co., 3 Nev. & Mac. 446.

WEIGHING GOODS AT STATION.—A railway company carried coals on their line for defendants, who were coal merchants, and delivered them at the defendants' wharf, which adjoined a siding at one of the company's stations, and they allowed the defendants, in consideration of paying a specified reasonable charge, to weigh out the coals to customers by a machine belonging to the company, placed in the station yard. The company had no express statutory power to make charges for the use of their weighing machines. *Held*, that the charges were not *ultra vires*, and the company could maintain an action to recover them from the defendants. London etc. *v.* Price & Son, 11 Q. B. D. 485; 52 L. J.,Q. B. D. 754.

Weighing goods carried on a railway at a railway station for the convenience of the consignees is incidental to the statutory powers of the railway company, and not *ultra vires*, and an action may be maintained by the company to recover charges for weighing them. London & Northwestern R. Co., etc., *v.* Price & Son, 11 Q. B. D. 48 5; 52 L. J. Q. B. D. 754.

WORKING AGREEMENT.—*Approval—Objections—Ultra Vires—Regulation of Railways Act*, 1873, *s.* 10.—The A Company applied under sec. 10 of the Regulation of Railways Act, 1873, for the approval of an agreement made between them and the B Company. The C Company raised objections to the approval of the agreement. The proposed agreement was made under the B Company's Act of 1879, with which part 3 (relating to working agreement) of the Railway Clauses act, 1863 (26 & 27 Vict. c. 92) is incorporated. By the act of 1879, power was given to the B Company on the one hand, and the C Company and the A Company on the other hand, to enter into agreements with respect to the following purposes: (1) The use by the C Company and the A Company, or either of them, of the B Company's railways, or any part or parts thereof. (2) The regulation, interchange, collection, transmission and delivery of traffic coming from or destined for the railways of the contracting companies, or any or either of them. (3) The fixing, collection, payment, appropriation, apportionment and distribution of the tolls, rates, income and profits arising from such traffic. (4) The payments to be made and the conditions to be performed with respect to the purposes aforesaid. The agreement provided that the B Company should give to the A Company the exclusive right to use the railway from the time when it was opened for traffic, with power to use it as fully and freely as if it was their own property, and the exclusive right of fixing and receiving tolls, rates, and fares demanded and taken in respect of traffic on the railway, and the A Company undertook in return to maintain the railway in good working order and condition, and to pay to the B Company four per cent per annum on all money raised at any time by shares, mortgages or otherwise, and expended by the B Company in and about the construction of the railway: *Held*, that the agreement could not be approved, because the B Company's Act, of 1879 did not authorize the two companies to enter into an agreement with respect to the maintenance of

WORKING AGREEMENT—*Continued.*

the railway, but only with respect to the use of the railway. The railway Clauses Act, 1863, part 3, treating use and maintenance as separate and distinct purposes; and also because the undertaking of the A Company to pay over half-yearly to the B Company such a sum as might be necessary to pay interest at four per cent per annum on their capital, was *ultra vires;* such guarantee not being limited to the funds to be derived from the user of the B Railway, but requiring the A Company to employ their own funds in case of need. *Re* Taff Vale & Treferig Valley R. Co.'s Working Agreement, 4 R. & Canal Traffic Cas. 54.

Arbitration Clause—Construction of—Capital or Revenue Charges—Reference under the Regulation of Railways Act, 1873, *Sec.* 8.—A working agreement provided that "all questions which may arise between the two companies as to the construction, intent or effect of the agreement, or any clause or provision thereof, or upon or in respect of the carrying the provisions of these presents, or any of them, into effect, or upon any matter arising out of the same respectively," should be determined by arbitration. Under such provision the question whether certain new works on the line were a capital or revenue charge, and whether works of the former class were chargeable to the owning company, was referred to the Commissioners. The agreement contained no reference to new expenses not chargeable to revenue; but it was contended that it must have been foreseen that new works would be required from time to time, and that the question how they were to be executed and paid for was a matter arising generally out of the agreement, and, therefore, one of those matters which the companies had agreed, in case of difference, to settle by arbitration: *Held*, that such particular difference could not properly be said to arise out of anything contained in the agreement, and that the arbitration clause did not, saving questions of providing for the due working of the line in the manner contemplated by the agreement (*e.g.*, to meet same requirement needed for the protection of the public), apply to matters not mentioned in any part of the agreement. An apparatus for heating water for the comfort of passengers is a revenue charge, for, whether made a fixture or not, such an apparatus is more an accessory to the business done upon a railway than to the railway upon which the business is done. Rehearing as to the question whether the working company was so working the Dublin & Meath Railway as fairly to develop, etc., the traffic. Midland G. W. R. of Ireland Co. *v.* Dublin & Meath R. Co., 4 R. & Canal Traffic Cas. 145.

Construction of—Appointment of Receipts—Terminals.—The A R. Co. worked under an agreement the B line (a cross line forming a junction at either end with the A Company's railways) which was leased to them. The third article of the agreement provided that the working company should place to the account of the B line a due mileage proportion of the gross receipts derived from through traffic. The A Co. carried through goods traffic over the B line past the junctions to their nearest stations

WORKING AGREEMENT—*Continued.*

on their own lines proper, for the remarshalling of such traffic and back again to the junctions, and thence to its proper destination, and claimed to include in their mileage for the purpose of division of receipts the distance between the junctions and the stations where the traffic was remarshalled, both ways. There was no station suitable for the interchange of through traffic at either junction. There being, in the opinion of the Commissioners, nothing in the agreement obliging the A Co. to provide such station, and the traffic in question not being so considerable as in the Commissioners' opinion to make it reasonable that it should pass from one line to the other without being taken into a station; *Held*, that the claim ought to be allowed. The B Co. contended that the A Co.'s mileage proportion of receipts for through traffic should be reckoned according to the mileage of the shortest route over the A Co.'s lines which could be taken. The Commissioners being of opinion that there was nothing in the agreement obliging the A Co. to take any particular route: *Held*, with regard to joint traffic, that whether the A Co. should be allowed to reckon mileage according to the distance of the route taken, or according to the distance of the shortest route, depended upon what was reasonable under the circumstances: *Held*, with regard to through traffic, the receipts for which passed through the clearing-house, that the B Co. were entitled to receive the same, as they would have received if they had been an independent company. Salisbury & Dorset Junction R. Co. *v.* London & Southwestern R. Co., 3 Nev. & Mac. 314.

Development of Traffic.—The B. R. Co. under an agreement, worked the line of the E. L. R. Co., which extended from Liverpool Street to New Cross, where it joined their lines. The agreement provided that the B. Co. should so work the E. L. railway "as fairly and efficiently to develop the traffic:" *Held*, that the B. Co. could not be enjoined, under the agreement, to work the E. L. R. as if it were a trunk line of the B. Co.'s system, and amalgamated with it. London & Brighton R. Co. *v.* East London R. Co., 3 Nev. & Mac. 103.

By a working agreement, made in 1864, between the P. Co. and the C. Co., the C. Co. worked and maintained the P. Co.'s line, retaining a percentage of the gross traffic receipts. A special act subsequently passed, gave the C. Co. joint use with the P. Co. of a section of the latter company's line, on terms of paying interest on half the cost of construction of the section, and of paying in proportion to use towards the cost of maintenance; the section to be maintained and managed by a joint committee appointed by the P. Co. and C. Co.; the interest aforesaid to be treated as part of gross traffic receipts of the P. Co. for the purposes of the working agreement of 1864: *Held*, that the expense of maintaining the section, less any portion for which the C. Co. were responsible, was payable by the company. Portpatrick R. Co. *v.* Caledonian R. Co., 3 Nev. & Mac. 189.

Fairly Developing Traffic—Advertising Competitive Route—Agreement as to Maintenance of Railway—Reference under Sec. 9 of the Regulation

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of Railways Act, 1873.—Under a working agreement by which the working company is to work the railway of the worked company as part of their system of railways, and "convey traffic thereon in a proper and convenient manner, and so as fairly to develop the traffic of the district:" *Held*,

1. The trains on the worked line must be timed so as to correspond with the trains on the lines of the working company, rather than with trains of another company with which they might be made to connect.

2. The working company must as fully advertise a competitive route over the line of the worked company as they do the route on their own line which competes with it.

3. The working company must give equal facilities as to through booking *via* the worked line, as *via* their own, must not prefer their route in the matter of rates, and must not fix the rates on the worked line too high in proportion to the rates on their own line. In failing to do any of these things, the working company would subject the traffic of traders desirous of using the worked line to an undue and unreasonable prejudice. An agreement that the working company shall maintain the railway of the worked company in substantial repair and good working order and condition, the worked company being bound to provide at a certain station proper terminal accommodation to enable the working company to carry on and convey the traffic, and being bound to pay to the working company such toll, rent, or other consideration for the use of a third company's line and station as the working company might have to pay such third company, it was *held*, that the word "maintain" was limited to the railway of the worked company and did not extend to the station or any portion of the railway of the third company.

There being no provision in the agreement as to station, services, signalling, disinfecting cattle-trucks, and the like, and the working company receiving mileage and terminals for working the traffic, the working company was made to bear these expenses. Clonmel Traders *et al. v.* Waterford & Limerick R. Co. 4 R. & Canal Traffic Cas. 92.

New Works on Railway—Developing Traffic—Extra Trains—Stopping at Stations.—If a line is leased on condition that it shall be used and worked efficiently, and so as to develop the traffic, and the lessees are to receive for their remuneration a fixed portion of the receipts, the obligation to work efficiently, and to maintain the traffic, remains the same, whether the lessees' working expenses are above or below their share of the receipts.

Where a railway is worked and maintained under an agreement which provides only for repairs and maintenance, and not for the first cost of new works, such works ought, in general, to be made the subject of special arrangement, from time to time between the companies; and where no arrangement has been come to, the company executing the same must bear the cost itself—at any rate, where their construction has not been ordered by superior authority. It is the duty of an owning company to supply a working company with a line capable of being efficiently worked

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without danger to the public; and therefore, where new works are necessary for that purpose, such works are to be executed by the owning company at their own expense; and if such company, after due notice, were to refuse or neglect to execute any such necessary works, the working company would be entitled to cause them to be erected, and to charge the cost to the owning company. Upon complaint by an owning company that the working company did not use and work the railway, and all traffic arising from extensions of the railway, efficiently, and so as fairly to develop, protect and maintain the traffic fairly belonging thereto, as provided by the working agreement, the commissioners ordered the working company to run an additional third passenger train each way daily on week-days at certain times; such trains to be worked in good connection for through traffic, and the time for stoppages at stations on the owning company's railway not to exceed an allowance at the rate of four minutes for each station stopped at; and further ordered the working company to run not less than two passenger trains each way daily on week-days on the branch line of the owning company, timed for convenient connection and correspondence at the junction with the main line with trains arriving at and departing from such station. Dublin & Meath R. Co. *v.* Midland Great Western of Ireland R. Co., 3 Nev. & Mac. 379.

Reference to Commissioners under a Special Act.—Upon a reference to the railway commissioners, under a special act of the S. R. Co., which provided that any difference which might arise with respect to the working and maintenance by the D. Co. of the railways of the S. Co., as an integral of the D. Co.'s undertaking, should be referred to the railway commissioners, they determined the principles by which the apportionment of the accounts between the two companies should be regulated. In calculating the cost of working a section of railway as an integral part of the whole system, the proportion of locomotive expenses, and cost of carriage and wagon repairs to be borne by the section should be arrived at by taking the mean proportion between the proportions of the train mileage on the section to the train mileage on the system, and the traffic receipts on the section to the traffic receipts on the system respectively. Sevenoaks, etc., R. Co. *v.* Chatham & Dover R. Co., 3 Nev. & Mac. 63.

Revision of, by Railway Commissioners—The Regulation of Railways Act, 1873, *s.* 10.—A special act was passed which enabled the G. N. R. Co. and the M. R. Co. to enter into working agreements, and in pursuance of that act, an agreement was entered into the 14th clause of which was as follows: "Neither company shall make any bargain, treaty, agreement, or arrangement with any other company, or do any other act directly or indirectly, to affect injuriously the traffic of the other company, or to prejudice this agreement, without the consent of such other company." Upon an application by the corporation and chamber of commerce of Huddersfield to the railway commissioners, under sec. 10 of the Regulation of Railways Act, 1873, to revise the above agreement in the interests of the pub-

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lic, by declaring the said 14th clause to be invalid, or ordering it to be modified; *held*, that such clause acted prejudicially to the interests of the public, because it did not leave the railway companies at liberty to accommodate the use of their line to what was advantageous for traffic, and that the agreement must be modified either by the omission of the article or by the addition thereto of a proviso to the following effect: "Provided, that nothing in this agreement shall be used or operate to prevent either of the companies parties hereto from agreeing to any through rate, or entering into any agreement with any other company or companies with reference to the conveyance of traffic by any route hereafter to be opened, or which has been opened for the first time at any time since October, 1860, or to the interchange of running powers in respect of any such route or any part of it. Corporation, etc., of Huddersfield *v.* Great Northern R. Co. *et al.*, 4 R. & Canal Traffic Cas. 44.

Revision of Working Agreement by Railway Commissioners—Jurisdiction—Prohibition.—In 1858 a special act was passed which enabled the G. N. R. Co. and the M. R. Co. to enter into working agreements, with this proviso: "That no such agreement shall be valid until the same has been approved, both as to the period of the continuance and in other respects, by the board of trade." In pursuance of that act, an agreement was entered into, the 17th clause of which was as follows: "It shall be lawful for the board of trade, if they think fit, on the expiration of every ten years from the date of this agreement, or on the expiration of every ten years from the period when any revision thereof shall be made by them, to cause this agreement to be revised (but in the interests of the public only)," etc. Sec. 10 of the Regulation of Railways Act, 1873, transfers to the commissioners (*inter alia*) the powers of the board of trade under any special act with respect to the approval of working agreements between railway companies. Upon motion by the railway companies for a prohibition restraining the commissioners from entertaining an application by the corporation and the chamber of commerce of Huddersfield to the commissioners to revise the above agreement in the interests of the public, *held*, by the Queen's Bench Division, that the power reserved to the board of trade by clause 17 of the agreement was a power under a special act with respect to the approval of a working agreement transferred to the commissioners by the Regulation of Railways Act, 1873, and that the commissioners had jurisdiction to entertain the application. *Semble*, by the commissioners, the powers of the board of trade transferred to the commissioners by section 10 of the Regulation of Railways Act, 1873, with respect to the approval of working agreements, include the power of revision and modification given by the 27th section of the Railway clauses Act, 1863. Huddersfield Corporation and Chamber of Commerce *v.* Great Northern R. Co. *et al.*, 3 Nev. & Mac. 564.

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